The International Criminal Court's intervention in the Lord's Resistance Army war: impacts and implications

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Submitted for the Degree of
Doctor of Philosophy

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Division of Peace Studies

University of Bradford

2016

Abstract

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Title: The International Criminal Court's intervention in the Lord's Resistance Army war: impacts and implications

Keywords: International Criminal Court, Lord's Resistance Army, justice, peace, Juba talks, Rome Statute, peace versus justice, law enforcement, international criminal law enforcement, human rights

This thesis argues that the International Criminal Court (ICC) brings a new more deontological paradigm to international interventions, founded upon the universal application of legal principle, and displacing consequentialist notions of justice linked to human rights. Based upon the Court's Statute and mode of operations, it is argued that this is associated with assumptions concerning the ICC's primacy, military enforcement, and theory of change. The consequences of this development in volatile contexts are demonstrated.

The case study, founded upon analysis from the war-affected community, examines the impact of the International Criminal Court in the Lord's Resistance Army war, and reveals the relationship between criminal justice enforcement, and community priorities for peace and human rights. On the basis of evidence, and contrary to narratives repeated but unsubstantiated in the literature, it demonstrates that in this case these two imperatives were in opposition to one another. The Court's pursuit of retributive legal principle was detrimental to the community's interests in peace and human rights. The subsequent failure of the ICC's review process to interrogate this important issue is also established.

The research establishes that statutory and operational assumptions upon which Court interventions are based do not hold in volatile contexts. For the case study community and elsewhere, this has had adverse impacts, with significant implications for the ICC. The findings indicate that if these issues are not fundamentally addressed, principled international criminal justice enforcement in volatile environments will continue to have profoundly negative human rights consequences.

Acknowledgements

In presenting this work I am to a very large degree not only giving my own account, but also bringing together the knowledge of others who shared what they knew. I am particularly indebted to Archbishop John Baptist Odama, Bishop Macleod Baker Ochola, Lam Oryem Cosmas (providing comments on my draft from South Sudan was an astonishing achievement!), Carlos Rodriguez Soto (then Fr. Carlos Rodriguez), Rosalba Oywa, Patricia Adong and the other staff at the Acholi Religious Leaders' Peace Initiative, Jim Long John, and Godfrey Otobi Orac. From this situation of violence and turmoil inspiring leaders emerged. It was my sincere privilege to watch and learn from them—a memorable and humbling experience.

I would like to thank Martin Wilkinson and the other staff then at Quaker Peace and Social Witness (QPSW), Britain Yearly Meeting, for sending my wife Eleanor Chowns and me to Acholiland in the first instance, for supporting us there so ably, and for inspiring in us a Quakerly approach to the work. This framed and enriched our experience. When we arrived Paul Acaya Okot and his nephew Francis greeted us with warmth and kindness, which they extended throughout our time there. Perhaps on account of them particularly, I have always felt amongst friends in northern Uganda.

In Uganda I was preceded and then accompanied, physically and metaphorically, by peace practitioners, volunteers, researchers, and diplomats. Amongst them I would particularly like to thank Bjoern Eser and Petra Hilgers who sustained us there as colleagues and now true friends. Bjoern's thoughtful comments significantly improved my early drafts. Mennonite peace workers Dave and Mary Lou Klassen, Kathryn and Dan Smith Derksen, and Dale and Gann Herman, provided great support and compassionate guidance in navigating new surroundings. I am particularly grateful to Dave and Mary Lou for our first welcome to Uganda, and for teaching me about grace, a subject about which I still have much to learn, but perhaps less than before. Graham

Carrington and Werner ten Kate provided insightful perspectives from beyond Acholiland, and demonstrated that some elements of the diplomatic community had a deep understanding of the local context.

In setting this story in academic form I am following in the footsteps of professionals and academics Chris Dolan, Barney Afako, Sverker Finnström and Adam Branch, upon whose work mine draws heavily. From near and far they have all informed me, and I hope that I have done justice to their teaching.

I cannot name all those who have educated and inspired me in the community affected by the war—those who talked to me in the deep shade of a mango tree, on a bench with a warm soda, or in a swept homestead at the end of a long boda-boda ride. So many stories shared with me have been too horrible to hold in my mind. Despite these events many of my acquaintances had somehow sustained themselves without apparently being consumed by bitterness or the desire for revenge. Perhaps many had simply managed not to act upon it, yet by their restraint they set an example for us all. I do not believe that the Acholi have a unique capacity for forgiveness, indeed to believe so would I think diminish their enormous achievement in showing restraint, toleration or forbearance. In carrying out this work I have often witnessed their profoundly humane response to the darkest of circumstances. People's dignity in such adversity is enormously challenging. I am grateful to all those who patiently told me their truths or showed me the way.

I am also indebted to the Trustees of the Polden-Puckham Charitable Foundation. Throughout the PhD process they have supported me, allowing prolonged and extensive study time in order to carry out my research. Without this hugely generous gesture this work would not have been completed.

In Dr Jim Whitman I could not have wished for more wise and patient supervisory support, nor for a more inspiring role model as an academic mentor. It is a privilege to learn from someone whose vocation it is to teach, and that has been my experience.

I am also extremely grateful to Dr David Harris, who supported me in this process through its final stages. In being assigned to David I was simply very fortunate (again). I was delighted that from the start he understood my motivation, and it was his straightforward and knowledgeable guidance that brought the work to a successful conclusion.

My parents-in-law, Stephen and (Dr) Gillian Chowns have been wonderful and dependable supports to me and my family during my research period, stepping in time and time again, often at short notice, to fill the gaps in our family schedule. I also have to thank them for their forbearance and patience, in listening to me so frequently expound on my topic, yet still encouraging me to continue. I am particularly grateful to Gillian for her skilful proof-reading and clear-sighted suggestions in the final stages.

I would very much like to thank my children, Nathan and Ronan, and apologise to them for too often being too busy to swim, play and spend time together. If there has been a disappointment during this process, it was that it detracted from time with them. I am resolved to address this circumstance. Finally I would like to thank my wife Dr Eleanor Chowns. From the very start of this task she has supported me wholeheartedly, generously and with great forbearance. I am so grateful for her accompaniment on this journey all the way, from London to Gulu and back (and then to Bradford), and for her encouragement, incisive insights, and perceptive comments on my drafts, all delivered while apparently believing that I would complete this work, even when I was far from sure myself. For all these things and much more I am profoundly thankful.

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Glossary of abbreviations, acronyms and terms

ACORD	Agency for Co-operation and Research in Development
AI	Amnesty International
ARLPI	Acholi Religious Leaders' Peace Initiative
ASP	Assembly of State Parties to the Rome Statute of the International Criminal Court
AVSI	Associazione Volontari Per il Servizio Internazionale
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
CPA	Concerned Parents' Association (northern Ugandan NGO of parents of LRA abductees)
CR	Conciliation Resources, a UK-based non-governmental organisation
CRS	Catholic Relief Services
CSOPNU	Civil Society Organisations for Peace in Northern Uganda
DFID	Department for International Development (UK government development department)
DRC	Democratic Republic of the Congo
FCO	Foreign and Commonwealth Office of the UK Government
Gacaca	System of community justice in Rwanda, widely used after the 1994 genocide
GCVS	Gulu Community Vocational School
Gomo tong	The 'bending of the spears' traditional Acholi reconciliation ceremony, held at the end of wars to symbolise the close of hostilities
GoS	Government of Sudan
GOSS	Government of South Sudan
GoU	Government of Uganda
GUSCO	Gulu Support the Children Organisation
HRW	Human Rights Watch
HSM	Holy Spirit Movement, a rebel force in northern Uganda that emerged in 1987 led by Alice Auma Lakwena, that was defeated by the Ugandan Government 1988.

HSMF	Holy Spirit Mobile Forces, the armed wing of the HSM
HURIFO	Human Rights Focus (Gulu-based human rights NGO)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISIS	Islamic State of Iraq and Syria, the Sunni Wahhabi jihadist militant group
IWPR	Institute for War and Peace Reporting
JPC	Justice and Peace Commission of the Catholic Church, particularly the Justice and Peace Commission of Gulu Archdiocese unless otherwise stated
JR	Justice Resources, a small consultancy working on human rights and justice issues in conflict
JRP	Justice and Reconciliation Project
Kacoke Madit	Literally 'big meeting', this was an inclusive gathering of Acholi representatives to seek peace, run from a small London-based secretariat of the same name.
KFOR	Kosovo Force, the NATO-led international peacekeeping force in Kosovo
KICWA	Kitgum Concerned Women's Association
KKA	Ker Kwaro Acholi, the organisation of the Acholi traditional leaders
LRA	Lords' Resistance Army, the rebel group that emerged in northern Uganda under the command of Joseph Kony in the late 1980s
Mato oput	Acholi traditional inter-clan reconciliation ceremony
MONUC	United Nations Mission in the Democratic Republic of Congo

NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NRA	National Resistance Army, originally the military wing of the NRM, Museveni's rebel force that overthrew the Obote and Okello governments. It became the national army of Uganda, and later in 1995 the UPDF.
NRM	National Resistance Movement, the political organisation of Museveni's movement.
OTP	Office of the Prosecutor (of the International Criminal Court)
PTC	Pre-trial Chamber (of the International Criminal Court)
PVP	People's Voice for Peace (Gulu-based human rights NGO)
QPSW	Quaker Peace and Social Witness, part of Britain Yearly Meeting of the Religious Society of Friends (Quakers), a supporting organisation for community peacebuilding in northern Uganda from 2000.
R2P	Responsibility to Protect
Roco wat	The restoration of relationships in Acholi
Rome Statute	Rome Statute of the International Criminal Court
RUF	Revolutionary United Front, a rebel army that fought in Sierra Leone in the 1990s, and later became a political party
Rwot/Rwodi	Acholi traditional chiefs (singular/plural)
SCPA	Sudanese Comprehensive Peace Agreement
SCSL	Special Court for Sierra Leone
SIDA	Swedish International Development Co-operation Agency
SPLA	Sudan People's Liberation Army
Tong gweno	Acholi restorative justice ceremony performed to cleanse someone returning from war
TRC	Truth and Reconciliation Commission
UNDPA	United Nations Department of Political Affairs
UNICEF	United Nations Children's Emergency Fund

UNLA	Uganda National Liberation Army, who originally fought alongside the Tanzanians to overthrow Amin's government and became the army of the Obote and Okello governments. The UNLA consisted to a significant degree of Acholi troops, and was defeated by the NRA when Museveni came to power in 1986.
UNMIK	UN Interim Administration Mission in Kosovo
UNMIS	UN Mission in Sudan
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNSC	United Nations Security Council
UPDA	Uganda People's Democratic Army, a rebel group in northern Uganda from 1986-1988.
UPDF	Uganda People's Defence Force, the Ugandan national army that succeeded the NRA in 1995.
VWU	Victims and Witnesses Unit (of the International Criminal Court)
WHO	World Health Organisation

Introduction and methodological Issues

In the first instance, this study springs from the casual conversations that I had with Ugandans during the Lord's Resistance Army (LRA) war. One particular exchange in late 2007 has remained in my mind. Thomas[1] is an Acholi, at that time displaced from the war-affected area of northern Uganda where he is from, and where my work was based. He was also a friend of mine—someone whom I had come to trust and hold in great respect. Sitting in a Kampala café on close-packed Formica benches, he pointed to a copy of the *New Vision*, the government-controlled newspaper, and asked 'Can they not see that this will prevent peace? How can this war now end?' His question referred to an article concerning the International Criminal Court's (ICC) arrest warrants for Joseph Kony and other leaders of the LRA (Osike 2007). These were the Court's first arrest warrants—a decisive step by the ICC in its efforts to end the impunity enjoyed by one of the world's most brutal warlords. It was also a time of great significance in efforts for the furtherance of international standards of criminal justice in a region blighted by an exceptionally brutal civil conflict.

Thomas was not reassured by this development. He was not focused on the high-minded principles involved, but upon the possible consequences. What would be the impact of an ICC intervention upon his community? He was also questioning the relationship between international criminal justice enforcement during war, and efforts to achieve peace and uphold human rights for war-affected communities. Could efforts to achieve arrest be compatible with a negotiated end to the violence? As a father whose family remained in the LRA-affected areas, his concerns could not have been more personal, but they were no less pertinent to the larger dynamics then in motion. Coming from a

[1] His real name has been withheld to preserve his anonymity.
[2] The LRA periodically enforced its prohibition on bicycles (which they rightly perceived as used for such purposes) by cutting the limbs of those caught riding them, or cutting out the tongues of those it suspected of carrying messages.
[3] The researcher's vehicle was used sometimes to seek to mitigate the threat to such individuals
[4] When referring to the three major Sections of the thesis, 'Section' is capitalised.

constituency widely perceived as expected to benefit from ICC intervention, and in whose name many parties to the conflict claimed to act, his were real and important questions about the safety and prospects for his family. A decade later, this study is in many ways an articulation of his concerns, and an analysis grounded in evidence from the communities most closely affected, of the impacts and implications of these historic events.

Origins

The meeting with Thomas took place during my period of work in northern Uganda from 2000-2007 for two British non-governmental organisations (NGOs), Quaker Peace and Social Witness (QPSW), and Conciliation Resources (CR). Initially based in Gulu with QPSW, my wife and I established a programme to support local peace-building organisations working on the LRA war. Then from 2004 my employment with Conciliation Resources (CR) involved jointly establishing and co-managing their programme on the LRA conflict based in the UK, but with frequent widespread travel in northern Uganda and southern Sudan as the war shifted its focus. The work included accompaniment of peace activists throughout the LRA-affected areas; listening to the experiences of communities and individuals affected by the war; and hearing local community and leadership perspectives relating to the dynamics of the war and strategies to address it. Later efforts centred on research and conflict analysis, programme development and capacity building with our partners, and engagement at various levels including with the relevant diplomatic community in Kampala, Juba and London to facilitate the peace efforts of these organisations as their programmes grew.

Central to our work were five organisation—the Acholi Religious Leaders' Peace Initiative (ARLPI) operating in collaboration with the Justice and Peace Commission of Gulu Archdiocese (JPC), Ker Kwaro Acholi (KKA), the Gulu office of the Concerned Parents' Association (CPA), and later Totto Can in Juba. People's Voice for Peace (PVP), who were linked to the Agency for Co-

operation and Research in Development, Gulu (ACORD), provided further insights. The ARLPI/JPC collaboration involved the Anglican and Catholic Church authorities and their secretariats, with their extensive networks across the war-affected region, as well as the leadership of the Orthodox Christian and Muslim communities. KKA also engaged a significant and widespread local network, in their case of traditional leaders. CPA was an organisation of the parents and relatives of those who had been abducted by the fighting forces, and who were seeking their safe return. As well as having a particular analysis in relation to military efforts to end the conflict, they exhibited more balanced gender representation than our other partners. These organisations, their work, and relationship to the community are described in more detail in the section on community and civil society below.

Experience with these groups as a participant observer enabled me to develop an informed analysis of the conflict; however, numerous other contacts brought additional perspectives, as well as a regional and international overview. Upon our arrival in 2000 there were a small number of international NGOs present in Gulu. These included the Norwegian Refugee Council, Associazione Volontari Per il Servizio Internazionale (AVSI), Save the Children, and Catholic Relief Services (CRS). Following work by Ugandan peacebuilders and the UN, after 2002 the profile of the conflict was raised, and there was a rapid and considerable increase in the presence of international NGOs in northern Uganda generally, and Gulu particularly. Weekly security meetings provided an opportunity for information sharing with this burgeoning group, and their research reports (and informal contact with their researchers) added to the literature and knowledge of the conflict from various perspectives (reflected in the references provided). Also useful were diplomatic contacts, principally in Kampala and London, including most notably with the UK Government Department for International Development (DFID), the Foreign and Commonwealth Office of the UK Government (FCO), Swedish International Development Co-operation Agency (SIDA), and the Dutch Embassy. These, and numerous other Kampala contacts, provided information on how the conflict was perceived externally, from Kampala and internationally. In some

exceptional cases (DFID and the Dutch Embassy being particular examples) they also delivered strong local and regional analysis of events. These assessments were developed at an eventful time in northern Uganda. Following extensive campaigning by our peacebuilding partners, the Ugandan Amnesty Act was finally passed in early 2000. The following years saw the establishment of the Amnesty Commission and, by 2002, the development of a functioning return process for LRA abductees. This represented a reversal of previous Ugandan government practice, and heralded a period of increased hope for peace. During this time the foundations of the Juba peace process, the best chance for a negotiated settlement to the LRA war for over a decade, were laid (Drew 2010). However, the government's policy of enforced mass displacement of the civilian population was also considerably expanded, greatly augmented by spontaneous displacement in response to LRA atrocities. The UPDF Iron Fist operations also took place, extending their pursuit of the LRA (and the war itself) into southern Sudan. At the start of 2005 the Sudanese Comprehensive Peace Agreement (SCPA) was signed, transforming the situation of the LRA on the ground, and the LRA operations shifted between Uganda, Sudan and the Democratic Republic of the Congo (DRC).

Amidst these dynamics the 60th state ratification of the Rome Statute was secured and the ICC came into being. Following referral by the Ugandan Government at the end of 2003, the Court's arrest warrants against members of the LRA leadership were issued in 2005. It was thus possible to witness the impact of the first ICC warrants from a community perspective, while working to develop and sustain a detailed ongoing analysis of the conflict. This analysis was informed by Ugandan and Sudanese community-based peacebuilders with long experience and extensive networks across the conflict affected area.

This situation prompted the formulation of various questions prior to and during the ICC intervention itself:

1. What was the ICC's strategy for engaging in this context?
2. In what respects would the priorities of the affected community be aligned with the ICC's own institutional interests and agenda?

3. Where they conflict, how and by whom would these instances be identified, and competing demands negotiated, balanced and accommodated?
4. In seeking to issue arrest warrants into the conflict dynamic, how could the ICC ensure that its intervention would achieve arrest and end impunity, rather than (through its insistence on trials) end the possibility of peace negotiations and potentially prolong the war?
5. If the existing militaries, being the only credible means of arrest, were envisioned as enforcers, how would the ICC avoid its warrants legitimising further military aggression in the name of enforcement—aggression which had been ineffective in apprehending Kony for nearly two decades, but over the same period had included widespread violence against the civilian population?
6. If on the other hand, the ICC was part of a coordinated strategy for decisive military action to end the war militarily, what would such enforcement mean not only to the abductees who were and are the LRA rank and file, but also for communities seeking their rescue, upon which the LRA would presumably continue to prey to sustain their numbers?
7. How would the ICC's requirement for arrest be accommodated to local priorities for peace, and local strategies to achieve that goal through return of abductees and the granting of amnesty?
8. What in this context would be the relationship between justice in all its aspects for the affected population, and the process of international criminal law and enforcement of ICC warrants?

In considering these points I was far from alone; indeed, in large part I was simply articulating the concerns expressed by those around me—Ugandan peace and human rights activists, expatriate NGO workers and researchers on the ground in the war zone, as well as the diplomats best acquainted with the dynamics of the conflict. Most importantly, these questions were posted by members of the community affected by the war, seeking to make a living and support their families amidst the violence. At the time I could find no answers,

neither of my own, nor from amongst my contacts. This work now seeks to give some response, and in the process inform future international engagement for the furtherance of justice in volatile environments.

Scope and purpose of research

The purpose of this research is to offer a clear understanding of the impacts of the ICC upon the LRA conflict, and to provide sound analysis of its implications, particularly for the ICC itself. Some years on from the ICC's creation in 2002, and following its review conference in 2010, there is now an opportunity to independently take stock of its work. This research is intended as a contribution to that discussion, and it is hoped that the study can further a more rigorous evidence-based appraisal of ICC impacts, and serious deliberation about its mode of operations. It would be unreasonable and indeed naive to expect a new institution with an ambitious global remit to function perfectly from its inception in all circumstances, and equally foolish to imagine it could be the best judge of its own efficacy. In this instance, given the importance of the ICC's potential contribution to the achievement of the rule of law internationally, and the possible harm should its interventions have unintended consequences, there is a particular need for independent analysis of the results. As ever, past experience should be used to inform future practice.

The subject of this research is limited to the ICC's effects in volatile environments alone—those often characterised by militarisation or armed conflict, insecurity or widespread violence, and weak governance, including weakness or absence of the rule of law. Such conditions are restricted in geographical extent in comparison to the ICC's international reach; however, because of the particularly egregious nature of the crimes the ICC seeks to address, they are highly significant in relation to its remit. War crimes, crimes against humanity, genocides and crimes of aggression are likely to occur in these regions. The ICC's performance under these conditions is central to its purpose.

Volatile environments are also associated with contested narratives. When states, governments, institutions, communities, and individuals have much at stake, their commitment to independent scrutiny and assessment is likely to be put to the test—weakened by or subordinated to competing concerns. It would be illuminating for future studies to draw extensively on material from a selection of ICC interventions as the basis for analysis. However, in this case the competing nature of assertions relating to the single context of the first ICC arrest warrants alone, and the degree to which these assertions are or are not evidence-based, necessitated a focus on one ICC 'situation'. From this, a clear understanding of both the nature and limitations of the ICC and the consequences of its first cases can emerge. This thesis draws upon the extensive body of work that is now available, and is founded upon the researcher's experience as a peace practitioner in the region (Bell 2005; Denscombe 2007).

Data gathered during the participant observer phase of the research took case between late 2000 and the end of 2007, with an additional visit to the region made in 2010 that coincided with the ICC Review Conference held in Kampala. The period of university-based research at Bradford University, including the writing-up period, extended from late 2009 to the end of 2016. During the participant observer phase the author was based in Gulu from 2000-2002, and then in the UK but with frequent trips to the field between 2002 and 2007.

Participant observation took place extensively in what was originally Gulu and Kitgum Districts, which then comprised the whole of Acholiland either side of the Aswa River extending north to the Sudan border (including Amuru), South to Lira and Apac Districts, East to the border with Kotido District (including Kalongo and Pader) and West to Adjumani. Work also took place in southern Sudan/South Sudan, principally in Yei and Juba. Other travel extended beyond these areas. Contacts with the diplomatic community were mainly in London and Kampala. The work encompassed attendance at the ICC Review

Conference as indicated, and also periodic visits to Juba from 2005 to 2007, including during the talks process.

In relation to accompaniment of principle actors in the conflict, the author was mainly working with active individuals from Ugandan Acholi civil society, including Lam Cosmas, Fr. Carlos Rodriguez (later Rodriquez Soto) and Patricia Adong from ARLPI, Godfrey Otobi Orac from CPA in Gulu, and Rosalba Oywa from ACORD. Also included were Rwot Acana (paramount chief of the Acholi), Archbishop Odama (the Catholic Archbishop of Gulu), and Bishop Ochola (Anglican Bishop of Kitgum). The author accompanied these peace activists on the ground across the region, to large and small events and meetings, and to sites of recent and past government and LRA violence. The author's presence at various more minor events relevant to the study is recorded in the text. The researcher also worked with and alongside many other individuals active for peace in the region between 2002 and 2007.

The literature already includes some assessment of the ICC's impact over this period, and is rich in the number and variety of conclusions offered. The certainty with which conclusions are proffered does not necessarily reflect the extent to which they are substantiated. This thesis seeks to advance learning on the basis of evidence, and through doing so, inform future ICC interventions and contribute to a broader appraisal of the Court. It will use the ICC's Uganda warrants for LRA commanders as its focus.

It may be noted in this account that ICC officials have not been interviewed for the purpose of this study, nor have Ugandan Government officials been met. This was an inevitable consequence of the intention to strengthen the place of community and civil society perspectives in the literature in the time available, and redress the existing over-representation of official sources. Such views have at times tended to drown out accounts from the ground. Additionally, Prosecutorial, Court and Ugandan Governmental positions are well represented in multiple references throughout the text. This work seeks to go some way to redressing this imbalance and injustice. That is not to suggest that community

perspectives are homogenous, nor that representing a community view is unproblematic. That issue will be discussed shortly.

Another consideration and possible criticism might be that the work is not strongly associated with a particular analytical framework, aside from the analysis of justice. Observing the discourse on failed states, liberal peace, responsibility to protect, securitisation, and also international criminal law (ICL), which are relevant and referred to in the text, it was decided that the research material could be used most powerfully to make a case if set within a justice frame alone, to which supporters of the Court would mostly likely also subscribe. The contribution of this research is not of relevance only to critics of liberal peace or international criminal law, but to all who believe that justice is more than simple rule enforcement, that people should have some say in their own destiny, or that the pursuit of justice must not set aside the attainment of human rights.

Some might suggest that a single case study is of only limited significance. This concern would be justified if the results were of a quantitative nature that revealed correlations or associations between variables that would be of greater significance with a larger and more representative sample. If on the other hand, a single case study can be used to yield qualitative findings of a structural nature, for example to reveal assumptions upon which an approach is based, or systemic issues that are common to all cases, (for example relating to the Court itself), then a single study may have powerful implications of widespread significance. This study lays claim to the latter justification (Denscombe 2007, Robson 2002; Bryman 2008).

Field-based research process as a participant observer (2000-2010)

It can be acknowledged at the outset that the research process used differs significantly from a standard pattern—data gathering during three months of fieldwork within a 3-year study period. The research period for this work has

run from 2000-2016, encompassing the pre-ICC dynamics of the LRA war, the ICC's creation and engagement, the collapse of the Juba talks, subsequent interpretation of the ICC's impact, the 2010 Review Conference itself and the continuation of the conflict for a further decade. Such a drawn-out approach has advantages and disadvantages. A single three-year study can formulate a research question, offer standardised data collection, and deliver results within a relatively short time-frame. This work on the other hand offers an accumulation of field experiences including informal information gathering, wide-ranging non-academic research, and formal academic research processes, in multiple projects across the region.

The foundation for much of this experience was the accompaniment of community-based peace activists (from organisations to be described below) across the war-affected region in their work establishing and servicing a network of volunteer peace committees in all the major Ugandan centres affected by the conflict. These groups were involved in delivering a community-based strategy for peace that will be outlined in later sections. This included mobilising communities for peace and against violence, and for amnesty and return of the abductees. Work was at all levels, from active groups in each area, to mass new-year peace prayers held by the religious leaders, and traditional reconciliation ceremonies used to strengthen the return process. ,

As well as accompaniment on the ground across the war-affected area, the researcher was involved in collecting, processing, analysing and interpreting data associated with the peace work of the key civil society organisations active for peace (to be detailed below). This included hearing, transcribing or reading and processing many personal testimonies on the ground in the Internally Displaced People's (IDP) Camps or elsewhere, and receiving reports of violence against the community brought by volunteers to Gulu or other centres (often to the religious leaders). Much information was brought to the network of Catholic missions across the region, who in turn relayed it to the Gulu Archdiocese through radio contact (and later by mobile phone), mitigating the need for dangerous travel on the roads. This could provide daily reports of the

insecurity and violence. The information gathered by these means over the seven-year period of work in the region was often not necessarily statistically sampled, but it was of a very extensive nature, widely sourced by multiple means.

The researchers role also often included working on processing this material, including the creation of a web site and uploading daily reports of war-related incidents from across the region. Other roles undertaken included input to strengthen local organisations' survey sampling and data collection, analysis, writing and dissemination of civil society reports from the conflict affected region. Many of these reports are referenced in the text (e.g. ARLPI and JPC 2001; ARLPI et al. 2003).

More formal and direct roles in research to strengthen community-based peace efforts was also undertaken. Purposive and cluster sampling was used with semi-structured interviews by a small team of researchers managed by our programmes (Robson 2002). The author's role included formulation of the research questions, survey design, training and co-management of the small research team on the ground, data processing and analysis, and report writing. The engagement with such material did not stop at the point of passive dissemination. With colleagues' reports and information, analysis from the field was used to directly inform plans for community-based peacebuilding, and was actively brought to the attention of policy-makers and donor government representatives seeking to better understand the conflict dynamics, at face-to-face meetings in Kampala and Europe (e.g. ARLPI and JPC 2001; ARLPI et al. 2003; CR and QPSW 2006).

Beyond the lived experience of participant observation and active peace work undertaken, the author also carried out consultancy work for other international agencies. This included evaluation of the JPC para-legal programme across northern Uganda, and assessment of Austrian-funded work to support women's equality and youth employment. These tasks afforded further opportunities to carry out more rigorous research, including cluster sampling and the use of

semi-structured interviews with individuals and groups, and other data collection methods in rural areas, homesteads, camps, trading centres and main towns across the Ugandan war-affected region. Though focused upon the programmes concerned, the experience of gathering this data from the community, and its analysis, added new perspectives additional to that of community-based peacebuilding engagement.

Central to the researcher's role then, in the period from 2000-2007, was the development and sustenance of a strong analysis of the conflict informed by diverse datasets and multiple parties across the war-affected areas of Uganda. This analysis was essential to the role of supporting strategic peacebuilding measures to address the LRA war.

In relation to the ICC, the widely informed perspective available to the author by these means afforded an excellent vantage point from which to observe the Court's engagement in the conflict. The fact that the researcher's involvement spanned the period from before the ICC's creation, to the collapse of the Juba talks and beyond, was a further advantage. The author's lengthy period of observation afforded the opportunity to informally listen to the views on the ground about the forceful application of ICL, and observe the associated hopes and fears of communities. It also allowed, mainly through contacts with diplomats in Kampala, the observation of the prompt articulation of a disseminated narrative in support of the ICC's engagement in real time. The realisation that concerns expressed about the intervention were met so rapidly with (surprising as they seemed) assertions of ICC efficacy, led the author to begin to ask what evidence underpinned such analysis. It seemed likely at the outset that, with evidence not made available, such interpretations might not be the product of rigorous research.

The period of participant observation was concurrent with the rapid expansion of the return process in Uganda and its extension to Sudan, the building local momentum for peace from 2003, the Bigombe talks and the ICC Prosecutor's intervention from 2004, the signing of the Sudanese peace treaty at the start of

2005, and the Juba talks from 2006-2008. Though these events happened in relatively quick succession, a more standard PhD research process over less than a year in the field could not have captured these developments, their sequencing, and the appearance of contrasting narratives alongside them. The extended research period was essential to the understanding of these developments.

Equally, the intertwining of events and appearance of opposing narratives in relation to the community's peace-through-return strategy, and the ICC's enforcement approach, could not easily have been observed in a shorter study period. The ICC's unwavering insistence on trials during the Juba talks is justified in relation to the commitments enshrined in its Statute, but equally pertinent were the opposing strategies for peace run by civil society groups since before 2000 that were only then coming to fruition (though sadly not international prominence). The subsequent return to war, and differing interpretations of responsibility for those events, must rightly be seen in the context of both international and local processes—the latter only being clearly observed as the culmination of peace work over the preceding 5-10 years. For these reasons the period of participatory observation provided the main body of evidence and experience that was the foundation of this thesis.

Desk-based research process (2009-2016)

Early engagement with the literature confirmed that aspects of the author's lived experience contradicted written accounts. Despite the publication of well informed research from both academic and community perspectives (Gersony 1997; Dolan 2000b; ARLPI and JPC 2001; Dolan 2002; Human Rights Focus - HURIFO 2002; ARLPI et al. 2003; Branch 2005; Dolan 2005; Allen 2006a; Allen 2006b; Finnström 2006a; Finnström 2006b; Ochola 2006; Branch 2008b; Finnström 2008; Baines 2009), much of the discussion around the ICC's intervention appeared to be poorly informed. Even a brief survey of the literature surrounding the intervention revealed a significant lack of awareness

and understanding of the conflict; and from the local perspective with which the researcher was familiar, the prevalence of a number of oversimplifications and misperceptions, errors in logic, and even misrepresentations was noticeable (e.g. author's unpublished article now under revision prior to resubmission).

From this point, the approach principally comprised a study of the existing literature encompassing the relevant background to the ICC's development and intervention, and the case study context. While the first of these was relatively straightforward, the contested nature of narratives surrounding the LRA war necessitated a methodical approach. It was essential to trace claims that underpin these narratives from multiple references back to their sources, in order to assess their reliability. This was instructive, as while some claims were revealed as substantiated from multiple independent references, others were not. In the reverse process, an evidence-based understanding was built up from original research from diverse sources, principally from those active or based on the ground in the conflict region. While some differing emphases of interpretation persisted even in these accounts, there was a substantial degree of congruence in relation to recorded events and dynamics from multiple researchers, both academics and local practitioners, and with the author's own experience on the ground. From the competing narratives of the LRA war it was thus possible to generate an evidence-based understanding of events and the dynamics of the conflict, as well as greater clarity about the nature and sources of un-evidenced assertions (Robson 2002; Bryman 2008).

Using this substantiated clarity and corrected narrative of the conflict as a sound basis, it was possible to bring the two elements of the research together: the ICC's institutional background and engagement; and the situation of its first arrest warrants. As the Court entered this context, the dynamics surrounding the actions of this new institution could be observed, and the consequences identified or inferred. This provided an opportunity to develop a fuller understanding of the impacts of the ICC's intervention based upon the evidence, and to extract learning from these events of relevance beyond the single case in question. An additional output from the research was the

identification of unsubstantiated claims, and the process of their generation and dissemination. These too provided lessons relevant to future analysis of ICC interventions, and of significance beyond the case study itself (ibid).

Evidence from the community as the foundation for conflict analysis

This study is not based upon the author's material and experience alone. It seeks to advance the role of evidence from the civilian population more generally in informing our understanding of the LRA conflict. This is particularly important because disseminated narratives of the LRA conflict depart considerably from such material, without presenting alternative sources. The significant contribution of this work is that it brings material from the community level to bear upon these narratives, and establishes in their place a corrected understanding based upon evidence.

In doing this the researcher is following in the footsteps of others. Finnström's work is based upon his experience of researching and living in northern Uganda. Dolan's research (including that done through ACORD in Gulu) is rooted in significant periods based on the ground in the war affected region (and in Uganda for man. Branch too founded his work upon field-based research at a community level. In each case the methodology adopted by the authors attests to their engagement over a considerable period with the war affected population. It is their practice of presenting evidence from the community level that has been extended in this thesis (Branch 2004, 2005, 2007b, 2008b, 2009 etc; Dolan 2000b, 2002, 2005, 2010, 2011; Finnström 2006a, 2006b, 2011 etc).

The author's research and engagement on the ground has already been mentioned, but the foundations for this thesis extend beyond that material, and beyond the academic literature rooted in the field, to include significant local research. Surveys of community views by local organisations are also based on evidence from the ground, and these too powerfully challenge existing narratives (see Chapter 4). The ARLPI study 'Let my people go' (2001) is an

account of the creation and maintenance of IDP camps, based upon the views of 900 individuals in 24 IDP camps across Acholiland. It flatly contradicts the popular understandings in relation to this issue. Though less methodologically clear, HURIFO's 'Between two fires' (2002) report offers similar conclusions based upon widely gathered testimonies from IDP camps in Gulu District, and consists to a significant degree of excepts from interviews with camp residents. The ARLPI study 'Seventy times seven' (2003) is based on interviews with 200 returnees and over 500 participants overall, powerfully making the case for amnesty and return—one dismissed by academics and analysts more distant from the region (see section 6.2). The Blattman and Annan report 'On the nature and causes of LRA abduction: what the abductees say' (2010), based as the title implies on interview evidence, lends significant support to the case for considerable re-interpretation of popular understanding (section 4.3).

Beyond the author's material, that of other researchers, and local organisations on the ground who drew upon community views extensively, accounts based on lived experience were also informative. Prominent amongst these is the material presented by Rodriguez Soto (2009), who spent many years as a parish priest and peace activist in the region. Also of significant value because of their presence on the ground and their lengthy engagement in most of the IDP camps are the reviews by UNOCHA referenced in the text (2003-2005). The Ministry of Health of Uganda/World Health Organisation survey (2005) was extensive, sampling people's experience from across the region. Again, it's conclusions challenge popular narratives of the war. Other community-based survey data adds additional credibility, including that of the International Center for Transitional Justice (ICTJ) survey data, the widely disseminated misinterpretation of which is observed in the text (see sections 5.1, 5.3 and 6.2).

These sources, each rooted in accounts and responses of community members from across the Ugandan Acholi region, form a strong basis upon which to analyse the conflict, the ICC's engagement in it, and its implications.

Community and civil society

Throughout this thesis the term ‘community’ is used to indicate the population living in the war affected area. The principle element of this group were the Acholi people of northern Uganda, although neighbouring tribes were also impacted (sometimes greatly), by the war. The relevant population in Sudan and DRC are only included where clearly indicated by the text.

This is not to imply that the community experience can be un-problematically observed. Communities comprise diverse elements with contrary experiences, beliefs and views. Differences in age, gender, financial and social circumstance, geographical location, status, education, religion, ability or disability, opportunity and many other factors ensure that the reality of community experience and opinion is diverse, complex and multifaceted. Any claim to generalise a ‘community view’ should be made cognisant of this diversity.

However, notions such as the ‘overriding community desire for peace’, the ‘widespread community demands for access to their homes and land’, or ‘the desire to see the return of their children from the LRA alive rather than dead’ (all of which will be discussed), can be unequivocally stated as a community perspective, notwithstanding a minority of dissenters to each of these positions.

There were reasons for some degree of homogeneity of view on these points. The vast majority of the population of Acholiland at some point experienced extreme suffering, including the death or abduction of family members and/or friends, and forced displacement from their homes, and extreme poverty including hunger, and the collapse in many respects of normal social structures (e.g. Dolan 2011; Ministry of Health of Uganda and WHO 2005). With the population generally experiencing all of these things, many of them concurrently and over many years, and perceiving them to be caused by the war, they

overwhelmingly wished for the war to end (Finnström 2011; Pham et. al. 2005, 2007). To interpret this desire (which was accompanied by a desire for food) as simply one preference amongst others, as some studies have done, on the grounds of the complexity of community views, is to obscure the predominant community's wishes. This will be demonstrated (see section 6.2).

For that reason, this study does not shy away from indicating widely held community perspectives, but does so only where these are based on interpretations endorsed by multiple field-based studies, accounts and observations from across Ugandan Acholiland over periods of at least a decade. Consistent with the author's observations on the ground from 2000-2007, a comprehensive reading of the major academic scholars and surveys from those based in Acholiland, and the prominent local society studies using data from 1997-2007, confirm this view (e.g. ARLPI, Branch, Dolan, Finnström, HURIFO, JPC, Ministry of Health of Uganda and WHO, Rodriguez Soto).

If the notion of a community view is complex, so is the relationship of civil society to community. It is appropriate to acknowledge that the term 'civil society' encompasses many parties other than those with which this thesis is concerned. From Gulu in 2000, charged by QPSW to work as a 'resource for peace', the researcher determined to work to strengthen those civil society elements most engaged with the community, and most effectively seeking to address the priorities that the community identified (so far as could be practically determined). This work will focus on the principal civil society organisations active for peace in northern Uganda with some claim to representative status at the time. Even amongst those taking forward a community informed agenda, there are of course differences between their motivations and those of the community itself.

Ker Kwaro Acholi (KKA) was the CBO of the Acholi traditional leadership. Acholi leadership structures are beyond the scope of this work to discuss, but the organisation was able to reach communities across Acholiland. It used its standing to further the popular calls for peace, and engage with others to that

end. As is widely known, this included running reconciliation processes between Acholi clans, and ceremonies to support the reintegration of returnees. It also included engagement with the LRA to encourage peace talks and return (in collaboration with ARLPI and others), gathering and sharing information on LRA and UPDF activities against the community, and seeking to represent community interests in various fora. The traditional leadership were in all probability also engaged in seeking to strengthen and further the interests of their own institution—including by implication its undemocratic nature and unrepresentative qualities (e.g. Allen 2010). An analysis that naively interpreted all KKA aspects as aligned with the interests of the community would be incorrect; however, as one of the principal organisations with a significant claim to representative legitimacy and popular respect, it was active in promoting the community priority of a peaceful conclusion to the war that avoided the killing of community members.

The Concerned Parents' Association (CPA) too was an institution which sought the safe return of LRA abductees, and the protection from abduction of all children in Acholiland. This agenda was closely associated with the community agenda for peace. Nevertheless, being made up of parents and relatives of the abductees it represented a particular interest group within the population, more strongly supportive of return and perhaps more generally opposed to retributive justice and military efforts to destroy the LRA than the community as a whole. Not all community members wished for the abductees' safety, or their return—some doubtless (and understandably) wished them gone or dead. Although its perspectives and purposes were widely shared, the CPA like any institution had interests subtly distinct from those of the community.

The Acholi Religious Leaders' Peace Initiative (ARLPI) were central to civil society efforts for peace, and the participant observer role of the researcher. Bringing together all the main Christian denominations and the Muslim community they were the religious representatives of the great majority of the population. ARLPI collaborated with the Catholic Justice and Peace Commission (JPC). It organised impromptu popular protest rallies at sites of

killings and atrocities attended by hundreds, and annual new year's peace prayers attended by thousands. Church compounds were used as night-shelters for many hundreds of children seeking to avoid abduction. Archbishop Odama (the Catholic Archbishop), led a demonstration against abduction and the plight of young people, in which he himself slept in Gulu bus park in protest at their plight and lack of protection. Another bishop, whose wife had been murdered by the LRA, was an outstanding voice for peace and against retribution. ARLPI established peace committees run by volunteers across Ugandan Acholiland actively developing and promoting strategies for peace, and supporting the amnesty and return process on the ground. They also nominated messengers to bring news of LRA or UPDF attacks and atrocities from their communities to ARLPI—a role many took up at their peril.[2] Using these networks ARLPI was actively informed of people's aspirations and their plight on a daily basis. The organisation was able to bring these issues to national prominence, and because of their activism church representatives were singled out for killings by the LRA. Church compounds were raided and radios smashed or stolen, and their priests were often threatened and sometimes ambushed in their vehicles and shot.[3] The government too threatened and denounced them (Rodriguez Soto 2009).

ARLPI's separation from the population must be acknowledged. Their leadership was of course not gender balanced, nor representative in many other ways, and they were doubtless influenced by the agendas of their own parent institutions. Yet their congregations were enormous and active, and the Acholi community of northern Uganda was highly religious. From the experience of participant observer regularly from 2000-2007 it was clear that the agenda promoted by these selected civil society institutions, and delivered principally by many volunteers from the community, was relevant to (and a manifestation of) popular demands for peace, food, amnesty and return of their children, and

[2] The LRA periodically enforced its prohibition on bicycles (which they rightly perceived as used for such purposes) by cutting the limbs of those caught riding them, or cutting out the tongues of those it suspected of carrying messages.

[3] The researcher's vehicle was used sometimes to seek to mitigate the threat to such individuals

release from the camps to return to their homes. ARLPI, JPC, KKA and the CPA (who collaborated consistently on these agendas) were amongst the most prominent civil society advocates for the community, and particularly for their desire for peace, the return of abductees alive, and people's right to go back to their homes.

For these reasons, this research focuses on the substantiated wishes of the community founded upon evidence, and the role and agenda not of civil society as a whole, but of these key members of it who carried forward a popular strategy for peace based on a community-led agenda. Henceforth unless otherwise stated, in this study the term 'civil society' will be used to refer to these key institutions, which demonstrated through their engagement with the war affected community, and work to further goals overwhelmingly endorsed by them, their own leadership role for peace in the region.

Researcher identity and other limitations of the approach

No research is entirely objective and without flaws, and an awareness of these issues is essential in informing research methods and conclusions. The identity of any researcher will necessarily influence the data collected and the analysis presented. As a British white male, highly privileged in the northern Ugandan context, the researcher will necessarily suffer from biases of understanding and interpretation which will be reflected in the findings. Further misperceptions may relate to the field of knowledge and study, as a peace practitioner in the field and subsequently a researcher in Bradford (Denscombe 2007; Bryman 2008).

The author's work on the ground supporting the local peace organisations from 2000 to 2007 presents many advantages, but also some limitations. The privileged access enjoyed to many of those working on the ground for peace, and to the situations of their work across northern Uganda and into southern Sudan, equipped the author extensively for this research. Without this

experience it would not have been possible to have gained the overview of the conflict presented, nor to observe so clearly the impact of the Court upon the conflict, and its subsequent interpretation. However, it is important to acknowledge that as someone engaged with community peace processes the researcher was an active player rather than an entirely dispassionate observer.

The peacebuilding focus of the work is likely to have influenced data sampling and collection, data handling, interpretation and report-writing. As a participant observer the author was not neutral to the outcome of events, and while significant efforts were made to ensure that the research practice was not influenced by the author's subject-position, it is unlikely that this can have been entirely successful. The nature of the work will at times have exposed the researcher to elements of the community more predisposed to a peaceful resolution of the conflict, and less committed to military solutions. Through such biases the author may have been disproportionately influenced by those with agendas for the return of abductees alive, and less engaged with either supporters of the Government's military process, the LRA's campaign, or the ICC's prioritisation of retributive justice. Community members may in all likelihood have censored their responses to direct questioning (or that of Ugandan researchers) to provide answers they thought were preferable. Multiple other biases of sampling and response may have taken place, relative to geographic location, economic, social, educational or physical circumstances, gender, age and so on. Each of these sampling issues could have enhanced a preference in interpretation and analysis in favour of a community peacebuilding perspective.

Another issue is the author's lack of knowledge of the Acholi language, which doubtless caused the understanding of accounts and events to be less nuanced than it might otherwise have been, and is likely to have further influenced sampling efforts. Similarly, limited cultural awareness was probably a further impediment to learning, notwithstanding the researcher's best efforts to follow the guidance of Ugandan colleagues. Such considerations will doubtless have

affected both the author's own understanding, and others' perceptions of the research in the field, which will in turn have influenced accounts given.

Further biases relate to the perspectives of those individuals who guided the researcher through these issues and during the research period in northern Uganda in general. Our skilled and extremely well informed partners included the religious and traditional leaderships of the region, and particularly the talented and often inspiring staff working for peace and human rights on their programmes, with whom the author spent much time. Other important partners, whose perspectives contributed considerably to this work, included those representing parents of the abductees, self-help groups of victims of the LRA, and long-established centres for their rehabilitation based in the region. Their insights were instrumental in informing this work, though inevitably none were entirely objective. These individuals were well educated adults, more often men than women, and relatively privileged in their own communities (Robson 2002).

In relation to gender there were multiple challenges. With the author being male, and the religious and traditional leadership structures also being predominantly led by men, there is a high likelihood of significant biases in this respect. Men also tended to be over-represented in peace committees and other organised structures through which the author worked or gathered data. Significant efforts were made to address this issue. CPA was led by Angelina Atyam, while PVP was co-ordinated by Rosalba Oywa, both women of outstanding vision and outspoken views. Gulu Community Vocational School (GCVS), with which we also worked, was also led by a woman, bringing a total of three of the six organisations with which we initially engaged. Additionally the peace committees made significant efforts to promote women's representation, and women were well represented amongst the ARLPI secretariat, if not its leadership. Despite these measures the views of women will likely have been under-represented.

A further challenge was to embark on the formal PhD process in 2009 intending to use large amounts of data gathered before it was anticipated that the author

might use it as the foundation for a PhD. Notes from the field were not always maintained to the standard necessary for specific inclusion in the thesis, for example dates, locations, names, photographic evidence and other pertinent details were not always recorded. Sampling of data in insecure environments was often carried out hurriedly, to sufficient standards to develop conflict analysis and inform peacebuilding strategy yet not attract undue attention, but not always to standards ideally suited for academic research. Equally, documents that in hindsight would have further substantiated aspects of the work, were not always kept for future use or filed appropriately, either by partner organisations or by the researcher. As a result, while the body of data from the participant research phase remains extensive and generally authoritative, significant richness of detail has been lost even before the formal PhD process began.

In order to mitigate these effects the author actively sought to address such issues. This has not been a quick or superficial analysis of either the ICC, or the LRA war. The ICC is well documented from its own and multiple other sources. In relation to the case study context, the researcher was working in the region for seven years, travelling extensively across the LRA-affected areas in northern Uganda and southern Sudan. This prolonged pre-research engagement in the field encompassed multiple roles, and these exposed the author directly and indirectly to people's experiences of the war, from the personal to the national and international level. These perspectives were supplemented in the pre-research phase by learning from Ugandan government representatives, national and international NGOs, diplomats in Uganda and the UK, Court representatives, and others with a national and international perspective. This breadth of perspectives has contributed to the identification of common views from diverse quarters (Denscombe 2007).

Since the conclusion of that pre-research phase, the author has sought to address potential biases arising from the field experience through triangulation of that learning with the academic literature, local, national and international research, journalism and other sources. There has been the opportunity to

bring together multiple perspectives, testing conclusions drawn at one level with research at another. The account presented thus rests upon extensive evidence and accounts drawn from diverse sources (Bryman 2008). Limitations to the research are discussed further in section 8.2.2.

Structure

This study is written in three sections. Section 1 comprises three chapters, and provides a background to justice theory, the creation of the ICC, and issues relevant to its engagement in volatile environments. It concludes by identifying aspects of the Court's statute and implied mode of operations that are relevant to its engagement in violent contexts. Section 2 provides the case study material, outlining the dynamics of the conflict as understood by scholars who have specialised in the field, and as described by the local community at the time. It then articulates an interpretation of events in relation to the ICC's intervention that prevails in the literature and has been widely disseminated. It then tests this narrative against the evidence. Where discrepancies are encountered, an amended account is proposed that is consistent with the data. While Section 1 is concerned principally with justice, Section 2 deals with the dynamics of violence against the civilian community. Section 3 draws out the implications of the research findings, and throws light upon the power and purpose of the Court.[4] At the local level, its impacts relate to the situation—the LRA war, and the populations affected. At the international level the findings concern operational matters of relevance to ICC interventions in all volatile environments. Finally, at a statutory and theoretical level, the implications in terms of the legal foundations and moral underpinnings of the Court are examined. The findings prompt recommendations for further research at each level.

[4] When referring to the three major Sections of the thesis, 'Section' is capitalised. Where the text refers to itself, the sub-section(s) concerned are simply indicated as (3.2.4, 4.2) etc. Sub-sections are referred to as 'sections' (all lower-case) for brevity.

Contribution

This thesis makes a contribution to knowledge at three levels. In relation to the case study itself, it brings an analysis of the LRA conflict with a strengthened community perspective. To do this, it draws on original field-based experience and material from community-based research that has been under-utilised in the academic literature. This is used to significantly extend the notion of an 'official discourse' beyond Finnström's original work, into the period leading up to and including the Juba peace talks—a significant contribution (Finnström 2006a, 2006b, 2008). Correcting the marginalisation of community perspectives that has often taken place in mainstream accounts, the thesis establishes the principal dynamics of the war as relating to abduction by the LRA, and the displacement and deaths/killings caused by both military parties to the conflict. Using evidence from the ground, complemented by the academic research of others, the cyclical nature of the violence of both sides towards the community is demonstrated—a further contribution (Rodriguez Soto 2009; Blattman and Annan 2010). Bringing into the academic literature a clarification of the peacebuilding strategies of community-based actors, and on the basis of field-based evidence and literature from sources active on the ground, the war is demonstrated not as a two- but a three-sided conflict. Following the lead of Branch and others the agency of the community is observed (section 4.4). The thesis establishes a that the community had a distinct non-violent strategy to end the war, in opposition to violent approaches adopted by the LRA, government and ICC. This demonstration and articulation of community agency as well as its victimisation, constituting it as a third party to the conflict, is another contribution of the study. In the process, and as another original contribution, the work highlights how data has been selectively deployed by institutions to further incomplete or incorrect understandings of the war and the ICC's impacts (chapter 6).

Building from this firmly founded understanding of the LRA's war in northern Uganda, the second area of contribution is a clear understanding of the ICC's impact on events. In a three-sided conflict the ICC is observed to intervene against the civil society strategy for a non-violent resolution to the war, in favour of the government's military efforts against the other two sides in the conflict, the LRA and the community. The study analyses the ICC's impact on the Juba talks in some detail, and notwithstanding the possibility of failure in any case, the study reveals the Court's effect on talks. This was to place its own preconditions on their successful conclusion, which were and are still insurmountable, and thus to ensure the failure of peace talks indefinitely, as well as at the time of the Bigombe and Juba processes themselves. This clarification, on the basis of evidence and argument, is a further original element.

However, it is at the third level that the thesis makes its most powerful contribution to knowledge. By analysing the justice approach taken in the Rome Statute and the ICC, this work identifies multiple assumptions embedded within the Statute that underpin the Court's operations. These relate to its primacy over other international interventions, its justice frame, its enforcement, and its theory of change. Most prominently, the Court marks a decisive departure by the international community in relation to its interventions in volatile environments. The ICC requires that international interventions shift from justice notions emphasising the consequences of actions, to those prioritising a more deontological approach, that emphasises rule adherence and enforcement. The implications of enforcing this simple frame on complex violent contexts, and resisting considerations of their consequences, is profound.

Related observations spring from this finding. It is noted that international interventions bound by ICC arrest warrants are not, according to the Statute, to be accompanied by a context specific theory of change that articulates their anticipated impacts. Equally, the understanding that has been gained in the

sphere of international development, that for interventions to be successful they must be locally informed, has been largely set aside by the Rome Statute.

The profound impact of the shift away from consequentialist notions of justice towards deontological measures is shown using the case study. Significantly, and in a further original contribution, the learning is then extended by reference to other ICC interventions. The concerns drawn from the one context are demonstrated to be widely relevant. The thesis thus establishes that in volatile environments, the subordination of consideration of consequences is highly problematic. Application of the Court's deontological frame runs counter to the interests of communities affected by war while simultaneously failing to assure the extension of ICL.

Section 1 The International Criminal Court

Chapter 1 Justice in theory and practice

1.1 Tensions within the concept of justice

1.1.1 Introduction

Notions of what is morally right are beset by irresolvable tensions. These divergences manifest themselves most prominently as social and political upheaval or military conflict, but they are revealed at all levels and intensities, and in multiple arenas. With regard to justice, all human activity is held in tension as if upon a web, the threads of which are suspended between righteous poles that can never be reconciled.

Hobbes' 'Leviathan' depicts a state prior to the establishment of notions of justice, in which individuals strive against one another for survival. From this chaos, founded upon shared understandings concerning behaviour, alliances emerge. These germs of collaboration provide the possibility for group cohesion and progress. With social rules, societies can begin to generate, sustain, share, disseminate and apply knowledge or wealth. The wellbeing of all is served by social regulation of one kind or another. Even the simplest mathematical modelling of animal behaviour demonstrates as much (Hobbes 1651; Maynard Smith 1982).

To the extent that such systems rely upon notions of fairness, in order to elicit co-operation, 'justice is the first virtue of social institutions, as truth is of systems of thought' (Rawls 1999: 3). Social systems that endure require some semblance of order, and concepts of justice play a fundamental role in

establishing and sustaining relationships upon which such order may be founded.

However, as soon as different groups form, their interests may be in opposition to one another. Opposing interests generate conflict, as each entity seeks to advance its cause, often perceiving its claim to be just and legitimate. Conflict is not removed, but managed, displaced and sustained within and between groups; constituencies continue to espouse opposing views that rest upon opposing notions of justice. Such differences run to the heart of social and political debate, and concern how societies function and regulate themselves (Sandel 2011).

In our lives today formal and informal mechanisms to mediate these tensions abound. Within states for example, rules govern social discourse, economic activity and political debate, and these activities each negotiate justice issues. Many of our institutions are in part fora for the same purpose—social, economic and political structures engaged in framing, enacting, and enforcing conceptions of justice.

These practicalities overlie deeper disjunctures within the concept of what is just. These variances are ones we recognise even within ourselves. Poles of justice exist, that at once exemplify a pure conception of what is right, and simultaneously exhibit monstrous injustice. We experience an attraction to the notion of individual freedom, yet were it to be attained in its purest form we would find ourselves returned to a Hobbesian nightmare. We seek the greatest good for the greatest number, but would be repulsed by its achievement should it be secured through the use of slaves. Whatever our personal leanings between freedom, equality, the greatest good, or individual rights, there is a creative tension between the poles of justice that we as individuals, and the communities and societies within which we live, must navigate (Bentham 1789; Kant 1797; Nozick 1974; Rawls 2009; Sen 2011).

Prominent amongst our institutional mechanisms for the regulation of society and the promotion of justice are legal systems. Like justice itself, the law serves both a coercive and creative function, retributive in its treatment of transgression; facilitative and even foundational of collaborative enterprise. In its framing, enactment and enforcement, legal process carries with it assumptions about the nature of justice and the means by which it should be upheld. Even within the law itself, scholars differ about the extent to which the law should bend to accommodate external notions of what is just. Legal processes therefore sit not above, but within these debates about what is right. They too are suffused by the contradictions inherent in the deeper notions of what is just (Durkheim 1893; Marsh et al. 2004).

This thesis interrogates issues of justice, and how they are conceived in law and applied in practice. It concerns the creative tension between poles of justice, and what may happen when champions of one pole, through the purity of their vision and the clarity of their call, briefly triumph over the balanced nature of the whole, with considerable consequence. Proponents of one justice pole can fail to sufficiently appreciate competing claims. Driven by their cause, they may seek the mantle of the whole of justice, for one element alone. An account of the philosophical underpinnings of justice is well beyond the scope of this study; however, the relationship between justice and the law requires some clarification.

1.1.2 Consequentialism and deontology as two poles of justice

Most readers will be familiar with the essential distinction between consequentialist and deontological approaches for determining what is just. The former entails an assessment of the just nature of an action according to its consequences. It is often associated with utilitarianism and the writings of Jeremy Bentham, and is frequently characterised as relating to the achievement of the greatest good for the greatest number (Bentham 1789). The

determination of a just deed with reference to its outcome is a powerful measure; a pole of justice with significant appeal. It also has deficiencies. In the first instance it requires the prediction of the outcome of an action, which may be difficult or impossible in many instances. Following from this, a consequentialist approach fails to provide a clear code by which the just nature of actions can be determined. Without such a code, norms of behaviour are much more difficult to establish. A further significant concern is that it may lead to the interests of a minority being disregarded for the greater good of the many. At the utilitarian pole, unbalanced by competing justice concerns, if a horrific act against a small number brings benefit to a sufficiently large number, it is permitted. More rounded consideration of what is just reveals that the ends do not always justify the means.

Deontological theories on the other hand, commonly associated with Immanuel Kant, concern acting in ways that are consistent with self-determined and just universal laws which, when used by individuals motivated out of duty, form a moral basis for action to the benefit of all (Kant 1797). Such an approach emphasises motivation, regardless of consequences. Unlike the consequentialist view, it prohibits the use of individuals as only a means to an end, and instead insists upon their being viewed only as ends in themselves. One may observe the emergence of notions of the rights of an individual in this view, and the more prominent use of rules to govern behaviour. This approach has clear advantages. It requires no predictive capacity, and by delivering a code that may guide behaviour it can contribute to the establishment of norms. Yet it also has flaws. In practice societal rules or laws determined by imperfect processes may only approximate to deontological codes. Many laws uphold a degree of inequality and discrimination, whether overtly or covertly. They have outward deontological form, but not the inward quality of true deontological justice. Furthermore, to a deontologist the application of a just rule is sufficient, without reference to its consequences, even when obedience to this norm may result in monstrous injustice.

Yet few would argue that obedience to a code prohibiting lying would have justified the betrayal of Anne Frank and her family to the Gestapo. Deontological commitments must be held in tension by consequentialist considerations. These poles are necessary to the consideration of justice and neither alone resolves justice issues (Sandel 2011).

While the consequentialist and deontological poles are of particular concern to this text, more contemporary developments of considerable power must be acknowledged. John Rawls has attempted to address some of these issues. Most prominently, he has proposed that issues of justice be settled from behind a 'veil of ignorance', by ourselves as arbiters, unaware of our identity and place in society. This models fairness, as it prevents selfish bias. Under such a system, he suggests, we would reject utilitarian notions of justice, not knowing whether our own interests might be sacrificed for the greater good. Instead we might award to each person the most extensive liberties, consistent with similar liberties for all, and manage social and economic inequalities to the greatest benefit of the most disadvantaged, with positions allocated on the basis of equality of opportunity. These conceptions represent a considerable advance, but they do not resolve all justice considerations (Rawls 1999: 266).[5]

Rawls' attention to the needs of the most disadvantaged is strongly challenged by others, who regard the associated sacrifice of individual freedoms required as unacceptable. Libertarian systems propose that justice concerns individual rights, rather than societal approaches, and focus on property rights and their just acquisition and transfer (Nozick 1974). The pole of justice concerning individual freedoms is emphasised. We may observe then that the justice poles of freedom and equality are also in tension, each contributing to, yet neither resolving, the broader conception of justice.

[5] Were debates about justice themselves to be carried out from behind such a veil, one can only imagine how much more popular such a proposition might be.

Notwithstanding the role of consequentialist thought in identifying just actions, for pragmatic reasons social systems must adopt rules to allow their functioning. Equally, we must accept that a pure deontological approach, that advocates the use of rules fashioned by *each individual* for their own adherence, motivated by duty in a manner that they conceive as universally applicable, would be impractical. Groups require *shared* conventions of behaviour, albeit commonly informed by deontological perspectives.

In this text the term 'consequentialism' will generally be used, intending to include utilitarian notions in which the sum of costs benefits to the group are assessed. The opposing pole will be referred to as 'deontological', indicating the relatively close association of the law to such rule-based systems, but acknowledging the imperfect relationship of the law to a pure Kantian deontological system.

The discussion thus far has focused upon how justice is characterised. Once shared rules are established, consideration must be given to the mechanisms by which these norms are upheld, and a second area of theoretical debate concerns how *injustice* should be identified and addressed.

1.1.3 Addressing injustice—retributive, restorative and distributive modes

When social groups choose deontological systems to regulate themselves, quickly the question arises: what should be done when rules are transgressed? One means by which rules may be upheld and advanced is through retribution. Retributive justice, which requires an enforcement process, identifies the punishment of offenders as central. Justice is seen to be done when proportionate punishment is delivered by a transparent and impartial system—giving the culprits 'what they deserve'. Retributive methods necessarily address injustices of the past (Nozick 1981).

Deterrent justice, in some respects associated with retributive approaches, may also be achieved through punishment of the guilty party. In this case, its purpose is attained when future unjust acts are deterred—an effect anticipated if the probability of being caught is high, and the punishment severe. If freed from deontological constraints, disproportionate punishment that 'makes an example' of an offender may provide a more effective deterrent. Both deterrent and retributive justice modes may be enforced through the same punitive mechanism, though there is clearly some tension between their requirements. An informative discussion of these issues and others in relation to transitional justice and post-conflict reconstruction in Rwanda can be found in Clark and Kaufman (2008).

Systems operating a retributive or deterrent approach are focused upon the offender. Though they may have wider societal goals and their operation may be associated with consequentialist aspirations, they are triggered when rules are transgressed. 'Justice is done' when the penalty is delivered. Retributive and deterrent approaches thus concern the application of rules and the maintenance of norms, and require practical means of enforcement.

Restorative justice approaches have some similarities to retributive modes, but concern the repair of harm done and the restoration of the relationship between perpetrator and victim or wider society. These too address themselves to past injustice often identified by the transgression of rules, but rather than focus on offenders, they place victims more centrally. Reparation, which seeks to compensate individuals or communities for past injustice and repair harm done, may be involved. Avoiding emphasis on enforcement and punishment, these methods may not require the attribution of guilt. Restorative or reparative approaches can be appropriate in complex situations where protagonists have both victim and perpetrator roles. Additionally and more pragmatically, they may be appropriate where power resides with the perpetrator, thus preventing enforcement. Like retributive justice, restorative methods commonly concern the application of justice approaches to situations where rules have been

transgressed. They tend to be associated with the maintenance and extension of prevailing norms (Sherman and Strang 2007).

Yet other methods emphasise redistribution, whether of power, wealth, status, or other social, economic or political commodities. Distributive systems may be associated with more radical or fundamental egalitarian assessments of just arrangements. They go beyond consideration of adherence to, and transgression of, rules, and address themselves to societal structures and systemic issues. Unlike retributive or restorative approaches, which principally concern the maintenance or extension of norms, distributive approaches may imply more critical assessment of social structures (Konow 2003; Laczniak and Murphy 2008).

As utilitarian, deontological, libertarian or egalitarian approaches identify just arrangements differently, so too does each means of addressing injustice. Retributive enforcement punishes offenders; restorative methods reaffirm past arrangements; distributive approaches seek a more equitable future. Each alone fails to resolve justice even in relation to the stealing of a loaf of bread. The selection of a justice mode, like conceptions of justice itself, carries profound implications for the organisation of society. Through choices concerning the philosophical basis for justice and the mechanisms by which it may be advanced or sustained, much is determined.

1.2 Tensions of application—justice and the law

1.2.1 The veil is lifted

As soon as justice is applied, new tensions arise. Rawls' veil of ignorance is lifted, and the pure discussion of moral concepts becomes clouded, suffused by issues of power, interests and ideology. The application of justice is essential for its principles to become more than utopian aspirations; however, in the process much may be lost.

As Hobbes makes clear, societies require more than a theoretical system to govern behaviour. People's co-existence demands shared norms, which may take the form of rules or guidelines, that are understood and observed (Hobbes 1651). These may be freely adopted, individuals perceiving their own interests to be served by submission to common expectations of behaviour. Where norms are seen as just, conformity will be more readily secured. Yet social systems cannot function by acquiescence alone. If individuals transgress they must be punished, the better to uphold the norm and assure conformity of others. Where necessary, any society must deploy coercion to ensure compliance (Durkheim 1893).

To perform these functions in practice, states require social institutions for their proper regulation and function. By whatever means they are governed and whoever's interests they may favour, legislatures establish codified rules which are applied through legal systems. Such regulatory systems require both elements. Fairness and impartiality enhance legitimacy and confer authority, but the scales of justice are accompanied by the sword, and coercion ensures compliance. Systems that rely too heavily on one pole alone may prove unstable (Weber 1922).

In a Western context at least, the law may be divided into two main areas. Civil law governs the resolution of disputes and compensation. It includes the regulation of finances and investment, trade and property law. It also covers constitutional law governing how laws will be made and politics managed, and administrative law concerning the behaviour of governmental bodies. Criminal law, which this study is primarily focused on, concerns behaviour that is harmful to society, and relates to specific actions codified as crimes. Applied to individuals, the sanctions deployed may be punitive, but the objectives are not exclusively retributive. Though criminal law concerns the application of rules, its purposes encompass consequentialist perspectives. Through incapacitation of the perpetrator, deterrence, rehabilitation or other means, the regulation of society will be promoted (Marsh et al. 2004; Zender 2004).

As soon as it is applied then, justice is instrumentalised for other purposes. Through its role in legitimising societal regulation it becomes associated with social control. The law's relationship to justice is not straightforward, and divergent demands of justice and coercion add a new layer of complexity. Justice lends legitimacy, and affords the authority to wield the power. However, institutions clothed in justice may be vehicles for other agendas (Weber 1922; Foucault 1977).

1.2.2 Characteristics of the law

Laws operated by states display common characteristics, and in their ideal form consist of codes and processes that are principally constraints on the behaviour of individuals, institutions, and government; they restrict arbitrary abuses of power, and are applied in an independent and impartial manner. In relation to criminal law particularly, as will be the focus of this thesis, laws address infringement through applying retributive punishment. As argued above, such measures are perpetrator-focused, and relate to past deeds. Implicit in this approach is the notion that guilt can be ascribed to the individual. Once criminal law is codified and adopted, it must be enforced, in order that its purpose of norm maintenance and social regulation is achieved (Zender 2004).

Observing these preceding elements, Robertson has suggested that law is a coded system of rules over behaviour that are enforced through social institutions (2006: 90). He proposes that a crucial difference between law and ethics is the enforceable nature of the former. However, as has been demonstrated earlier in this chapter, this is not the only major distinction to be made between the two. The law offers an interpretation of applied justice measures mediated by consideration of power, interests and ideology. It also encodes assumptions regarding the tensions between the opposing poles of justice. Additionally, as discussed, criminal justice implies a retributive, backward-looking approach to transgressions that focuses upon the individual

offender, and arises from particular codified conceptions of what is just, and when justice has been upheld. Coercive force for societal regulation is associated with legal systems, not only in practical instrumental terms, but as a fundamental and intrinsic feature of the law. As well as applying justice, the law's purpose is to regulate society. Taken together these features demonstrate that any legal system will be both imperfect, and partial. Legal systems are neither intended to comprehensively express a society's understanding of justice, nor are they intended only for that purpose. The law does not resolve justice issues, but instead provides a framework as one element of broader justice perspectives. To mistake the law for justice is a profound conceptual error.

1.2.3 Legal positivism and idealism

The discussion so far has concerned how the law relates to justice at a conceptual level. However, there are also debates amongst legal scholars themselves, and within the legal establishment, concerning how the law should be conceived, applied and interpreted in relation to justice.

The aforementioned notion that arbitrary exercises of power should be curtailed can be observed in the Magna Carta, and before that at least back to Aristotle. Mani (2002) describes a minimalist view of law which offers one important perspective: providing a framework of regulation, it enables people to live within known boundaries and operate their affairs in a permitted manner. It facilitates predictable and consistent patterns of enforcement, outside of which the coercive or punitive power of the state will be withheld.

Such a conception of the law defines legal justice in its own terms, conforming to its own strictures, emphasising the requirement for internal consistency and independent application (Mani 2002: 1-50; Aristotle (no date)). This view is the foundation of legal positivism, which may be defined as: 'the theory that laws and their operation derive validity from the fact of having been enacted by

authority or of deriving logically from existing decisions, rather than from any moral considerations (e.g. that a rule is unjust)' (*Oxford Dictionary of English* 2010).

Positivist legal scholars thus contend that the law's legitimacy rests upon its foundations, not its consequences, and hold centrally that there is a separation between law and morality (Hart 1958; Hart 2012). More recent scholars concur: 'In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.' (Gardner 2001: 199) Such a view contends that the law's relationship to justice in its broad sense is more distant than has hitherto been discussed. Others concur:

> Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practised, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction. (Green 2003)

Legal positivism thus upholds the notion that the law is justified from within. The positivist ideal is a system of law that is entirely consistent internally with itself (Coyle 2006).

This minimalist conception contrasts with a maximalist position, which seeks to extend the relationship of law to justice. Sometimes described as 'legal idealism', such a view anticipates that the law is an expression of notions of

justice not limited to the impartial application and enforcement of internally consistent regulation. This view holds that the law as practised should reflect moral demands and lead to just outcomes. Such arguments may be founded upon conceptions of natural law that posit certain rights and values as universally applicable, conferred by virtue of human nature (Mani 2002). Alternatively, maximalist views are also proposed from an interpretive perspective, which places emphasis on the interpretation of legal statutes and history to deliver just outcomes. In recent decades this position has been championed by Ronald Dworkin, most prominently in his book *Law's Empire* (1986).

Observers will note that an overly positivist approach may deliver judgements that conform to legal requirements, but depart so clearly from society's moral sense that they may weaken the legal system, by promoting unjust outcomes that undermine its legitimacy and authority. By contrast, an overly idealist view may deliver judgements that satisfy society's moral sense but, because of the complex and often contradictory nature of ethical considerations, they may produce legal judgements that lack consistency. Through the introduction of broader justice considerations, such an approach may be more vulnerable to political and philosophical challenge or manipulation. It could ultimately weaken the legal system by failing to develop a unified approach to legal questions that can be applied impartially (Coyle 2013).

Such tensions of application are introduced as soon as justice is sought or claimed by legal means. While some of these relate to the lack of independence of legal systems from unjust influence, others concern the law's regulatory function and necessary association with coercion. Further conflicts arise between notions of law that value internal consistency, against those that prioritise just outcomes. Irresolvable differences of justice conception are overlain by inherent tensions of legal application.

1.2.4 Competing, complex and diverse notions of justice in Africa and the West

Justice in all societies is a contested notion, and simplistic binary comparisons of African and Western views are rarely if ever helpful. It should be acknowledged that the distinctions above spring from a Western philosophical origin, and may not fully encompass all African notions of justice, which are themselves competing, complex and diverse. The moral and cultural expectations of cultures that have developed largely in isolation from one another over centuries are likely to differ. Nevertheless, in order to function, all societies must regulate justice issues, and notions such as obedience to norms, the importance of consequences in determining just actions, punishment of transgression, maintenance of relationships, and consideration of the distribution of power and resources amongst people, are likely to be common to all. In that context, and noting that there will be limitations to the application of a Western frame, the justice concepts discussed so far remain powerful in understanding diverse African justice notions.

In recent decades, the South African Truth and Reconciliation Commission has been a prominent example of the application of justice processes in Africa. Its conception and implementation display deontological and consequentialist elements. Seeking to navigating the post-apartheid situation, in which transgressions of justice norms had been extreme and systemic, the Commission did apply deontological norms—there were requirements to tell the truth in order to avoid prosecution for crimes for example. Yet its emphasis was less retributive than a prosecutorial approach, and in the event it contributed to the avoidance of further widespread violence while delivering significant justice measures—a consequentialist success. The public articulation of truth, apology and contrition also laid the foundations for considerable restorative justice progress (*Truth and Reconciliation Commission Report of South Africa* 1999; Tutu 2012).

The post-genocide *gacaca* process in Rwanda is also amenable to analysis using the justice notions so far described. It emphasises restorative methods, deploying an element of punishment with the fundamental aim of restoring relationship between the parties to a conflict (Clark 2008d: 297-319). Such practices depart significantly from legal notions of justice, with their much stronger emphasis on retribution, which can dominate the justice discourse in the West (see 3.1.5). Another prominent element of *gacaca* is its participative nature, with its legitimacy residing in theory at least in the involvement of the populace rather than its administration by an independent elite. Unsurprisingly, such processes have come under significant criticism from the international legal establishment, and others, whose understanding of justice norms and purposes may differ (ibid).

In Uganda local justice practices such as *mato oput* were, like *gacaca*, adapted from traditional roots to address the considerable wrongs committed in the LRA war and manage their aftermath. They too emphasise restorative elements, put less weight on retributive justice than is common in the West, and seek to repair relationships and allow social structures to continue to function after great injustice (Pain 1997; Allen 2006b: 128-168; Baines 2007). Local justice is discussed in more depth as an element of Ugandan peacebuilding in Section 2. These examples illustrate that justice measures applied in Africa, as elsewhere, contend with opposing elements that are in tensions with one another. The successful furtherance of justice requires that its competing elements are applied in a balanced and considered manner.

Conceptual issues are not the only influences bearing upon African approaches to justice. Practical concerns commonly have significant influence on justice measures adopted, and this has been apparent in South Africa, Rwanda, Sierra Leone, Uganda, and elsewhere (Clark 2008d; Harris and Lappin 2010; Okello et al. 2012; Beresford 2014). These issues of implementation are the focus of the next section.

1.3 Tensions of implementation—international criminal law (ICL)

The discussion so far has clarified which elements of justice are promoted, and by what mode they are advanced, when the law is applied. ICL, though emphasising a deontological process, nevertheless seeks outcomes that can only be assessed consequentially. Such outcomes relate to the advancement of human rights and other goals, as well as the attainment of ICL. The relationship between these fields requires some explanation from the outset.

International law governs the relationships between states, their interaction with international institutions, and the functioning of those institutions themselves. Unlike municipal law within functioning states, international law suffers the weakness that it is not consistently enforced, operating as it does without a police force or compulsory court, notwithstanding the work of the International Court of Justice (ICJ). States can ignore its basic principles, and go unpunished. Yet it is not impotent. States also perceive their vital interests to be bound up with its general maintenance, the better to ensure stability of the international system, and therein lies its strength. This practical necessity for the regulation of behaviour, rather than considerations of natural law or justice itself, is the foundation upon which international law rests (Dixon 2013).

While municipal law originates primarily from national legislatures, international law stems from multiple sources. Article 38 of the Statute of the ICJ names these, while specifying what texts apply. Included in the list are international treaties, customary international law, general principles of law, judicial decisions and other sources. To this list, resolutions of other bodies including the UN Security Council and General Assembly should also be added (Dixon 2013; Shaw 2014).

As a branch of the UN, the ICJ was established in the momentum for improved international governance that followed the end of the second world war. Its remit was limited at the outset to disputes between states, and even then only to those accepting its jurisdiction. While its Statute confers upon it the ability to intervene in human rights cases, in practice it has been little used. The Court has struggled to secure not only jurisdiction (both China and Russia for example, have never accepted its authority), but also compliance with its rulings (France and the US have withdrawn after facing cases against them). As a result, Britain remains the only permanent member of the Security Council that accepts its authority (Robertson 2006: 99).

While notions of the rule of law and civil law date back over two thousand years, and international law has been developed over the past few hundred years, international *criminal* law has only recently emerged. International criminal law is distinguished from other branches of international law by its focus on individuals as perpetrators. The Nuremberg trials influenced the development of both international criminal justice, and the Universal Declaration of Human Rights, which is discussed in section 1.3.2 (UN 1948a, Robertson 2006: 34). The trials established the notion that individuals have international duties, which transcend their duties to states. War crimes, crimes against humanity and crimes against peace were each articulated, while genocide was soon to follow, and named as transgressions that amount to international crimes (Cassese 2008).

Following the military tribunals post-world war two, the Genocide Convention (1948) was intended to further this development. It had little impact, and despite the efforts of the International Law Commission, the machinery of legal enforcement in relation to the gravest breaches of human rights law was not effectively put into place (Maogoto 2004). This issue was not tackled until the latter years of the last century, when *ad hoc* tribunals were established to deal with grave breaches of human rights (Cassese 2008: 315-335). These

developments and their association with the establishment of the International Criminal Court are discussed in the next chapter.

1.3.1 ICL and its relationship to power and enforcement

When justice finds its expression in the law it does so at some cost to itself. The tensions encountered in the transition from pure conception to codification inevitably mean that it will be compromised to some degree. Then, when the law in turn finds expression through implementation, a second step from pure notions of justice is taken. In order to secure its coercive capability, law must secure the necessary practical means, and additional compromises will usually be necessary.

Regarding criminal law within states, the necessary means to secure law enforcement are relatively straightforward. Notwithstanding the independence of the judiciary (should it be so), whoever controls the executive will in many instances control both the civil powers of arrest and the means of retributive punishment. With its monopoly on the legitimate use of force, the state is well placed to act within its own borders (Weber 1919). In these circumstances, arrest is commonly decisive and quick, taking place with sufficient power so as to be overwhelming. Enforcement in this context may have few extraneous consequences.

This may also be the case with international criminal justice. The Nuremberg and Tokyo tribunals, and to a large extent the *ad hoc* tribunals/ hybrid courts (for example those for the former Yugoslavia, Rwanda, and Sierra Leone) also applied criminal justice in relatively stable contexts, compared to the contexts in which crimes were committed. Granted, in certain circumstances this process was not entirely uncontroversial in relation to its possible destabilising impacts; however, ICL was enacted in these circumstances without igniting further mass violence (Ostojic 2014).

Relative to national law enforcement, at the international level the stakes are higher. The negative consequences of failure to enforce legal standards have been clearly observed. Human rights and international criminal justice activists point to political and diplomatic compromises during peace negotiations that have led to impunity for the gravest crimes. Through the expediency of diplomats, perpetrators of atrocities who threaten continued violence have been allowed to evade justice—consequentialist concerns, perhaps focused on short-term considerations, have to some extent prevailed. It is this pragmatism, which some may perceive as amoral, that the institutions of international criminal law are intended to address. These bodies seek a more principled deontological approach. Robertson, articulating his sense of injustice at the impunity secured through negotiations and enjoyed by perpetrators, has characterised diplomacy as 'the antithesis of justice' (Robertson 2006: xxxii). Notwithstanding complications concerning the use of the term 'justice' as a synonym for the operation of legal process, this is a significant point.

One consequence of efforts to extend the reach of criminal law beyond state boundaries is the requirement for enforcement in regions where the state's monopoly on violence may be contested. To leave these regions untouched by the retributive process of ICL allows perpetrators—indeed often perpetrators of the most notorious crimes—to go unpunished. However, unlike criminal law within states, the enforcement of ICL is most needed in situations which are unstable or in turmoil, and often where crimes are ongoing. These are circumstances of the greatest institutional and humanitarian risk. Here, the promotion of ICL enforcement may legitimise the use of force, influencing the balance of power in favour of arrest; but it may also have other, less favourable outcomes.

Since international law lacks any standing enforcement capacity, if the norms of international criminal justice are to be extended globally, the institutions of international criminal law will need to align themselves with political and military

power on an *ad hoc* basis. Overtly, this presents a threat to their impartial operation—a significant risk (Rodman and Booth 2013).

Thus, relative to municipal criminal law enforcement systems the machinery of ICL faces uniquely difficult challenges. These encompass the extreme gravity of the crimes addressed, the scale, severity and complexity of the security contexts encountered, and the difficulty of enforcement in these environments. The enactment of ICL takes place in arenas that are inescapably political, with competing and sometimes powerful interests. Such complications far exceed the demands usually placed upon a criminal court (Snyder and Vinjamuri 2004; Franceschet 2012a; Franceschet 2012b).

Additionally, in forming the necessary alliances, the servants of ICL must be seen to be impartial, free as far as possible of political and institutional interests. Advancing their purpose, they will encounter the tension between their legal mission to extend impartial and unwavering norms of criminal justice, and their own political circumstances. They must accommodate themselves to political and military power, but they must not be seen to do so.

1.3.2 ICL and its relationship to human rights

In conflict and war, human rights are not consistently advanced by the most powerful stakeholders; they are not necessarily upheld by the dominant political forces; nor are they generally advanced by the stronger military power. A belief that they are would be astonishingly naive. Yet without its own enforcement machinery ICL is anticipated to engage in such contexts to end impunity, and many expect it to do so in a manner that advances human rights. These are not contexts that resemble an idealised conception of the Nuremberg trials. Quite the opposite—they are turbulent situations of extreme ongoing violence. Into these arenas, the conflicting tensions within and between justice and the law, including its coercive elements, are being placed. It is appropriate then that the

relationship between the promotion of international criminal law and human rights is considered.

The relevance of human rights to ICL has already been implied, and it is a thread that runs through the tensions previously identified. Assessments of human rights impacts are necessarily consequentialist. The human rights banner, in different guises, is claimed by champions of both the freedom and the equality poles of justice. Maximalist views of law prioritise outcomes perceived as just, reflecting concerns that include human rights issues. When choices are made in the real world between concepts of justice that are in tension, there will be human rights consequences (Mani 2002).

In general terms, prior to the second world war, human rights were not central to the concerns of international relations. With the exception of laws on slavery, and civilian treatment in war, there was little in international law that concerned what we now term human rights. Perspectives on this issue were changed by the second world war, the manner in which it was conducted, and particularly the Holocaust of systematic mass murder of civilians by the German Nazi regime. Following the allied victory it became apparent that the world lacked the legal machinery with which to address such acts, in relation to both the protection of the victims and the punishment of criminal perpetrators (Donnelly 2007).

This study has argued that that ICL confers upon individuals duties; conversely, international humanitarian law (IHL) confers rights. Like other aspects of international law, IHL principally originates in treaties and custom. The UN Charter was signed by 51 states in 1945 and entered into force after its ratification by the five permanent members of the Security Council in the same year. Today almost all nations have joined, bringing the total to 193 out of a total of 206 (UN 2015a). The preamble to the Charter affirms ‘faith in fundamental human rights, in the dignity and worth of the human person’ and for the first time in a treaty recognised human rights as of international concern. According to Article 55, the UN is bound to promote ‘universal respect for, and

observance of, human rights and fundamental freedoms for all' (1945; Dixon 2013).

However, the Charter did not effectively oblige states to uphold these standards, or articulate clearly what they were. The latter task at least was fulfilled in 1948, when the UN General Assembly adopted the Universal Declaration of Human Rights, with eight abstentions and no dissenters, though opposition by the US and USSR amongst others prevented the creation of a binding document (UN 1948a, Robertson 2006: 32-40). The Declaration is now generally accepted to be the foundation of human rights law, and it underpins a body of human rights treaties at both national and international level (UN 2008; UN 2015b).

Today three generations of human rights are recognised. The first of these is advanced by the International Covenant on Civil and Political Rights (ICCPR). It concerns, amongst other issues, the right to life, freedom from slavery and torture, the right to a fair trial, and recognition before the law. These are the rights most commonly written into national laws (UN 1966a). The second generation concerns social and economic rights, such as the right to work, social security and education, and these are underpinned by the International Covenant on Economic, Social and Cultural Rights (UN 1966b). The enforcement of these rights is less consistent than those of the first generation, their nature being more diffuse, and the tone of the document being more promotional than regulatory. The third generation is more general, concerning the right to development, environmental protection, peace, and self-determination. While the previous generations clearly relate to individuals, these latter elements are to some extent more communitarian. To some degree they are harder to define, and any binding regulatory measures may be more difficult to secure (Dixon 2013).

As we have seen, the furtherance of the norms of law rest upon a particular mix of consequentialist and deontological approaches, and ICL is no different in this respect. Through the dispassionate application of its codes to its caseload in

deontological mode, ICL is intended to deliver the consequence of a more just global environment. Persuaded of this perspective, most advocates for ICL perceive the extension of its norms as closely linked to the promotion of human rights. This is a natural association, as international criminal law is intended to address the most serious crimes—ones in which breaches of human rights have been extreme. Bringing perpetrators of such crimes to face the full force of the law is envisaged as a fundamental step towards establishing these acts as internationally unacceptable. Through its operation case by case ICL will, it claims, establish the norms that its advocates wish to see upheld and extended globally (Human Rights Watch - HRW 2004b; Schabas 2006; Cassese 2008: 3-31; HRW 2008; Mendes 2010; Schabas 2011: 61).

Yet even within states, on occasions where violent crimes are ongoing, for example in hostage situations, the process becomes more complicated. Consequentialist considerations may emerge, and political power may be exerted to temper the legally driven imperative for enforcement. Despite the judicial requirement for timely due process, negotiations may take place; arrest may be delayed or even eluded; compromises may be struck; hostages may be rescued. Human rights on this small scale may be furthered by some moderation of the exigencies of criminal law. Under some circumstances there may be tension between the demands of criminal law and furtherance of human rights (Franceschet 2012b).

Returning to the international stage similar examples may be conceived. The requirement to enforce ICL may be placed upon some states, while perpetrators themselves control the enforcement apparatus of another or others (or alternative significant means to defend themselves). As with hostage situations, but on a grand scale, there is then the potential for operations associated with criminal law enforcement if unchecked to have significant human rights impacts. The tensions that occasionally exist in unstable situations within states may be greatly magnified at an international level.

These tensions have already been demonstrated, for example in Northern Ireland, and Geoffrey Robertson's preface to the third edition of his book *Crimes Against Humanity* addresses this issue (Robertson 2006: xvii). Robertson rightly celebrates the achievement of peace in Northern Ireland as a positive step for human rights, and he does this in the context of observing the more general advancement of international criminal law. Yet peace in this instance was achieved through the Good Friday Agreement, which stipulated the early release of paramilitary prisoners convicted under British and Irish law (*Good Friday Agreement* 1998). Many of them were guilty of killings and other serious crimes. What is notable in Geoffrey Robertson's argument is that in this instance peace was attained in part by overlooking the requirements of legal process and releasing those who had been convicted, so that human rights and justice in a broader sense might be furthered as a result. Criminal law in relation to a small number of individuals was set aside in order to promote human rights and justice more broadly for the community as a whole. Principles of international criminal law must on occasion be tempered in furtherance of justice. Appreciating the long and complex political history, many in the UK and the Republic of Ireland welcomed the achievement of peace, and recognised the necessity of compromise. Others have articulated the importance of such flexibility in different contexts (Vinjamuri 2010).

Unfortunately this example also contradicts the point which Robertson previously sought to make in the same paragraph of his preface, when he discusses his retention of the subtitle of this book 'The Struggle for Global Justice'. As the book concerns the advancement of international criminal law and the associated end to impunity for perpetrators, the case for the achievement of peace and justice in its broad sense through selectively bypassing criminal law enforcement in Ireland, north and south, is not illustrative of his point. Justice may be furthered by promoting the application of criminal law in some circumstances, and by setting it aside in others. If one is to estimate the relevance of criminal law to the attainment of justice, it is better not

to conflate the two as Robertson has done, but to distinguish clearly between them at the outset.

We may now expect that our notions of the relationship between ICL and human rights will be tested. With the advancement of ICL into new situations of ongoing civil strife and terrible violence, these issues will be clarified. Positivist priorities for legal consistency will battle with idealist notions that the law should reflect human rights imperatives; deontological views concerning regulatory enforcement will vie with utilitarian notions of just consequences. Dynamic tensions within and around legal processes, and embedded in our concepts of what is right, will be played out in the most violent contexts of our time.

1.3.3 ICL and transitional justice—moving from volatility to good governance

Issues raised up to this point relate to the foundations and form of ICL, and its relationship to other aspects of law and human rights. However, the role conceived for ICL reaches beyond engagement with other legal approaches. It is anticipated that during this century ICL will become central to, and set parameters for, the engagement of the international community in volatile environments as a whole. To the extent that international institutions are seeking to enable such regions to move towards good governance, ICL is now expected to play a key role. It is pertinent to briefly consider how this significant new mode of operations relates to the existing literature on how states recover.

There may be instances where communities have transformed themselves directly from a condition of lawlessness to one regulated by the law, impartially and without the need for intermediate stages. This could perhaps happen more readily in societies in which a functioning and well-resourced state passes transiently through a period of political violence, before returning to its former stability. Often, however, the shift from violence to good governance is a troubled process. States that have experienced traumatic events do not easily

return to well-regulated norms (Collier et al. 2008). This can be the case particularly in regions that were never well-governed, well-resourced or stable, or where violence has been particularly prolonged, widespread or deep-rooted. The traumas currently experienced by societies in Somalia, Afghanistan, Iraq, Syria and Libya, as illustrated on the World Bank 'Worldwide Governance Indicators' interactive web site, all illustrate this point (World Bank 2015). Societies experiencing militarisation or armed conflict, insecurity or widespread violence, and weak governance including weakness or absence of the rule of law, do not easily transform themselves. Almost by definition, communities suffering these abuses are prominent amongst those experiencing international crimes (Snyder and Vinjamuri 2007). They are the volatile environments that are our focus.

Such territories have been the subject of significant academic and political discussion. Two fields are identified here for attention: the literature on 'failed states' as some have called them, and the literature on transitional justice. Each is very extensive, and a brief review of both these fields will be helpful.

Weber's observation in 1915 that for a state to function it must retain its monopoly on the use of physical force remains relevant today (Weber 1919). The past three decades have seen the production of a considerable volume of literature on failed states. However, this concept has also been brought into question, revealed as influential in policy-making circles whilst flawed or at least very poorly defined as a concept itself (Taylor 2013). Despite these difficulties, the term has been widely applied and adapted—for many purposes. The notion of failed cities, and efforts to measure the extent of failure, broadened the use of the concept (Gros 1996). Taxonomies of state failure have emerged, suggesting their varied nature and the necessity of developing improved understanding in order to inform reconstruction interventions. Within these debates, the collapse of the rule of law is observed amongst other ills (ibid).

The factors perceived to lead to the creation of such volatile environments are varied. They may be structural—relating to inequalities of social, economic or

political power, including those stemming from previous post-conflict settlements. The failure of the rule of law is but one aspect amongst many; both a cause and symptom of wider dysfunction. Failures of criminal justice do not by any means encompass the totality of the challenges faced by affected communities (Bates 2008; Collier 2008; Collier et al. 2009).

Despite the difficulties associated with 'state failure' as a term, the means of state recovery have become an abiding preoccupation of the international system. Unsurprisingly these are also complex and multifaceted, requiring trade-offs between different approaches. Brinkerhoff (2005) has identified core concepts and cross-cutting themes relevant to rebuilding governance systems. Ramsbotham et. al. (2011: 213) provide a post-war reconstruction/ withdrawal matrix listing five broad sectors (security, law and order, government, economy, and society), relevant to enabling states to move on from conflict. In each of these sectors phases are indicated within which different aspects of post-conflict recovery work may become appropriate. These elements they describe as 'non-sequential and nested', and they amply illustrate their interdependence and complexity. The importance of context in informing the nature, order, interrelationships and manner of these interventions is implicit throughout. In these complex contexts, the holding of democratic elections has also been individually examined. This work also endorses the general picture of mixed and complex outcomes dependent on context (Chesterman et al. 2005; Collier 2009; Wimmer et al. 2009; Cederman et al. 2013). In relation to the transformation of volatile regions to patterns of good governance, almost all studies attest to the complexities of this process. Such rebuilding has been characterised as 'among the world's gravest challenges' (Myers 2008).

The literature on transitional justice is also considerable. According to the ICTJ, transitional justice refers to 'the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms' (ICTJ 2015). Working in the aftermath of the Rwandan genocide, Clark

poses a framework of six key transitional justice themes: reconciliation, peace, justice, healing, forgiveness and truth (Clark 2008b). He outlines the tensions that exist within and between these concepts, and between aspiration and capability for each of them and their constituent parts. The analysis presented in this collection highlights the difficulty of disentangling and addressing these issues, emphasising how decisions must be based upon a thoughtful consideration of these complex interactions that is highly specific to local circumstances. It suggests that these determinations shape how post-conflict societies recover from violence, and that the consequences of such choices can be long-lasting and unpredictable (Clark and Kaufman 2008).

These intricacies, and the growing literature in this field serve to further emphasise the importance of context in determining outcomes relating to justice. Given these fields of study, the deployment of international criminal justice in a particular context will almost certainly require careful deliberation, good timing, sensitivity to conditions (including extant transitional justice measures already in place) and a degree of flexibility. An uncompromising stance by any party may prove problematic (Minow 1998; Cobban 2007; Hinton 2010).

The literature on volatile regions and on transitional justice reflects the observation that recovery from widespread violence and lawlessness to well-regulated governance, justice and stability is not straightforward. Implicit in both fields of work is a strong emphasis on the multifaceted nature of internal or external actions required to contribute to the rebuilding process. There is a need for a deep understanding of the context, and the adaptation of interventions in order that progress may be made (Bates 2008).

By contrast an essentially deontological application of ICL would place less emphasis on context and multifaceted processes. It would provide a clear standard of global retributive justice, applicable to all contexts. The ideal behind such an approach would be that ICL's deployment will contribute to establishing a route out of lawlessness and state dysfunction, and towards the achievement

of universal human rights. On occasion, this may be the case; however, there may also be a tension between the law's imperatives and the need for multifaceted interventions with context-specific, complex priorities for state recovery, as indicated by the research base.

An unwavering vision of the extension of ICL into volatile environments then presents certain issues. The relationship between the enforcement of ICL and the promotion of human rights and justice is uncertain and variable, and the implications of enforcement in volatile environments, even in the recent past, are yet to be fully understood. In any event, the literature on volatile environments and transitional justice presents an evidence base that instead endorses context-dependent, multi-faceted approaches.

1.4 Review

Chapter 1 has introduced the concept of justice as suspended between poles including those of equality, freedom, deontology, and consequentialism. Each pole contributes to the whole, while no single pole resolves justice issues itself. Each in its extreme form, un-tempered by the others, presents the possibility of great injustice. It has also explored approaches to the maintenance of justice, including retributive, restorative and distributive modes. It observed that each of these achieves and identifies just outcomes in a different way. This analysis showed ICL to further one particular aspect of justice, with a specifically deontological and retributive approach.

Section 1.2 looked at the relationship of justice to law, and introduced issues encountered when notions of justice are formulated and enforced as law. Further complications concerned the distinction between legal positivism and legal idealism, and debates about if and how notions of morality should influence the legal process. As in the West, African notions of justice were identified as competing, complex and diverse, extending well beyond and above legal frameworks, and into environments where retributive approaches may be

neither effective nor practical. These arguments demonstrated that the relationship of the law to justice is contested, both in the Western and international context.

Finally, the relationship of ICL to the practicalities of enforcement, the furtherance of human rights, and the advancement of good governance in violent contexts, was discussed. The evidence-base to support the prioritised application of ICL as the most appropriate means to promote justice in these context was questioned. These matters commend ICL's application and enforcement in volatile contexts for analysis.

Underlying much of this Chapter, and indeed significant aspects of this thesis, is the relationship between the law and power. ICL, conceived as Justice and equipped with the scales, must negotiate discreetly with Power for the sword; Power, newly clothed in Justice's robes, becomes freed to pursue its own agendas. Such is the stepping-off point for this research.

Chapter 2 Interventionism, international criminal law, and the creation of the ICC

2.0 Introduction

Liberal interventionism, the pursuit of liberal objectives in foreign policy, has gained significant momentum in recent decades following the fall of the Berlin Wall and end of the Cold War. Western powers have sought to promote values and structures informed by their own experience, with the support of international institutions under their influence. New foreign policy objectives have included the advancement of human rights and the promotion of good governance. Efforts have embraced measures to strengthen multi-party democracy; reform of the security sector; (re)build state institutions; strengthen checks and balances on state power including a free press and independent judiciary; and where finances allow, enhance public health and education (Sachs et al. 1995; UN 2000; Robert et al. 2005; Sachs 2012).

These liberal measures have often been accompanied by pressure for reform of economic and financial systems. Neo-liberal economic policies have been advanced in the name of development; international financial institutions have pushed trade liberalisation, open markets, independent central banks, and deficit reduction with structural adjustment. Such goals have been furthered through aid conditionality of bilateral donors, or terms set by international bodies such as the IMF and World Bank, through which considerable leverage has been achieved (Dollar and Svensson 2000; Easterly 2005).

Such interventions have come under increasing scrutiny on the grounds of their questionable efficacy, as data has emerged and problematic issues have been revealed. Others regard these initiatives as more fundamentally flawed, an

extension of the West's historical practice of imposing externally generated ideas, systems and structures, especially upon African or other peoples (Young 1995; Paris 1997; Duffield 2001; Chang 2002; Cooper 2007; Clark 2010a; Mamdani 2010; Paris 2010; Cooper et al. 2011).

Increasing international support for military backed humanitarian intervention has supplied further impetus. The extension of ICL into new environments may be seen in the context of these events. Conceived as of benefit to its recipients, it provides a framework of fundamental standards that are universally applicable, and to which all have a right.

2.0.1 Drivers for decisive humanitarian intervention and international criminal justice

In the context of liberal interventionism, and the burgeoning debate about its consequences, there were particular circumstances that strengthened the case for forceful humanitarian engagement. The 1990s saw the eruption of a series of brutal civil conflicts. Most notable amongst these was the Rwandan genocide of 1994 in which over 500,000 were killed, and which was only brought to an end by the invasion of the Rwandan Patriotic Front made up principally of Rwandan exiles from Uganda. In its aftermath, the preceding failure of the international community to intervene militarily to protect the Tutsi population proved a powerful incentive for more concerted and principled international action (Eriksson et al. 1996; Evans 2009; Mills 2013; UN Undated).

The sense of frustration with international impotence was heightened by the Srebrenica massacre the following year, in which over 8,000 Bosnian Muslims, mainly men and boys, were murdered by the Army of Republika Srpska under the command of Ratko Mladić in a formerly UN-designated 'safe area'. This atrocity, described as 'genocide' by the ICJ, and the worst crime on European soil since the second world war, added to the mood for more decisive

international action in the face of mass crimes (Annan 2005; ICJ 2007; BBC 2014).

Significantly, following the failure to intervene militarily in Rwanda and Srebrenica, other international action in the same year was more decisive. UN forces on the ground were supported by a North Atlantic Treaty Organisation (NATO) bombing campaign (its first major combat operation) to protect UN 'safe areas' in Bosnia and Herzegovina from Serb forces. Further NATO bombing followed in 1999 in Kosovo when air power was used to force the withdrawal of the Yugoslav army from the territory, in preparation for the NATO (Kosovo Force) KFOR ground forces peace-keeping operation and the establishment of the UN Interim Administration Mission in Kosovo (UNMIK) (Beale 1997).

The momentum for forceful humanitarian intervention was reflected, and further enhanced by the successful engagement of the British Army in the long-running war in Sierra Leone a year later. Operation Palliser was originally planned as a means to effect evacuation of foreign citizens from the Freetown area in the wake of advancing Revolutionary United Front (RUF) forces. The engagement led to more assertive British involvement in the war in support of the Sierra Leone Army and UN forces, and the subsequent defeat of the RUF.

These events prompted other diplomatic moves. The Responsibility to Protect (R2P) doctrine was developed in response to a United Nations call to develop clearer norms around international responses to systematic gross human rights violations (UN General Assembly 2005: para. 138-140; Ki-Moon 2009). This was initially taken forward by the International Commission on Intervention and State Sovereignty in the early years of this century, and proposed balancing states' right to sovereignty with responsibilities placed upon them. Where a state is unable or unwilling to protect its people from major violations of their human rights it proposes criteria to be used to assess the case for military intervention (Evans and Sahnoun 2002; Evans 2009).

Efforts to promote international criminal law can be seen in this liberal interventionist context. Allied, in intention at the least, to the promotion of human rights and now with the possibility of UN-endorsed military operations, here was a chance to extend criminal justice processes and strengthen international norms. Released from the compromises necessitated by the cold war, political allegiances could be forged that might apply these norms. Justice might now be included in the liberal project; events at this time provided further impetus (Young 1995; Ki-Moon 2009).

The 1990s was thus a time of heightened optimism concerning the potential for international intervention, military if necessary, to promote security, peace, human rights, and good governance. Set against the backdrop of shameful inaction, and followed quickly by successive military, political and purported humanitarian success, some felt that debates concerning the legitimacy of intervention and uncertainty of outcome should be set aside, replaced by the promise that more muscular political leadership, prepared to take decisive military action to promote clear humanitarian outcomes, could prevail. International prosecutions at the *ad hoc* international tribunals, shortly to be discussed, enhanced the credibility of this vision, indirectly creating steps towards the broader goal of advancing norms of international criminal justice. These were not only achievements in themselves, but part of an overarching narrative of global humanitarian progress: the more enlightened deployment of military power, aligned with the clarity and impartiality of the international criminal justice process, promised a brighter future for humanity (Crane 2005; Robertson 2006).

2.1 Creation of the International Criminal Court

Some perceive that, like humanitarian aspects of liberal interventionism, the development of the International Criminal Court (ICC) has been largely driven by the aspiration to reduce human suffering in war (Robertson 2006). The following sections trace its development, from early efforts to constrain military excesses to modern attempts to secure a climate of accountability for the gravest crimes, and with it the primacy of law over political and diplomatic expediency.

2.1.1 Origins

On 3rd January 1872 the Swiss humanist Gustave Moynier presented a proposal to the International Committee of the Red Cross for an international tribunal to enforce humanitarian norms and laws during war (Maogoto 2004). Moynier had previously believed that reason and public opinion alone could rein in the behaviour of states and prevent the worst abuses. However, events during the Franco-Prussian War had obliged him to change his views. Moved by the suffering of civilians and spurred by the impunity subsequently enjoyed by perpetrators on both sides, he had become convinced of the need for international enforcement of humanitarian law. His proposal was for a permanent international criminal court able to bring suspected perpetrators to international trial (Hall 1998).

Over a decade earlier, his compatriot the businessman Henri Dunant, shocked by what he had witnessed, recorded the suffering of casualties in the aftermath of the battle of Solferino. His account was widely disseminated, and influenced both the establishment of the International Red Cross four years later (a project with which Moynier was also involved), and the drafting of the first Geneva Convention of 1864 which provided for the humane treatment of injured or sick

combatants in war (Dunant 1862; International Committee of the Red Cross - ICRC 1949).

Moynier and Dunant's concerns had precedents. The aspiration that the conduct of war should be governed by laws, or at least regulated by humanitarian considerations, had been articulated centuries before. In 'The Art of War' Sun Tzu advocated the avoidance of the annihilation of an opponent or other unnecessary violence, and respect for prisoners of war (Tzu 500 BC?). Such sentiments influenced the conduct of war in India, Japan and Europe in subsequent centuries, and by 1625 these ideas had been strongly supported by Grotius, who advocated that suffering inflicted on civilians should be limited to that determined by military necessity. A century later, motivated by humanitarian convictions, Montesquieu asserted that protagonists in a conflict should inflict the least possible harm in order to achieve their objectives, and his contemporary Rousseau sought to underscore the distinction between active combatant and civilian, and to demonstrate on the basis of reason why the latter should not be targeted in war (Grotius 1625; Rousseau 1762; Beigbeder 1999).

If Moynier's goal of reducing suffering in war was not new, neither was the aspiration of addressing it through legal process. The trial and execution of Peter Von Hagenbach in 1474 by a court of the Holy Roman Empire for brutal crimes committed during the occupation of Breisach in modern day Germany may be the earliest example. It is notable that the defence that he was following higher orders was rejected by the court (Schabas 2011). Though rarely applied, the concept of individual responsibility for what would now be termed international crimes endured and was strengthened over subsequent centuries. In 1815 for example, the Congress of Vienna obliged state signatories to prosecute alleged pirates and slavers under their own national laws (Beigbeder 1999; Maogoto 2004).

These faltering steps towards international humanitarian standards and criminal accountability took place alongside the emergence of the European powers and the development of partially conflicting imperatives of military doctrine. The

birth in Europe of the modern nation state is often traced back to the peace of Westphalia in 1648, when the concept of the sovereign state with sole authority over its territory and peoples was consolidated (Maogoto 2004). Such sovereignty permitted no interference in the internal affairs of another state, thus allowing national leaders to evade accountability for their violations of international norms (and for the mis-treatment of their own civilians). In this context, war could be seen as a normal aspect of international relations; 'the continuation of policy by other means' (Von Clausewitz 1832). The strongest states prevailed, using diplomatic means where possible and military means where necessary to pursue their national interest. From the early nineteenth century Clausewitz's ideas increasingly influenced military strategy, and his doctrine of decisive military force placed humanitarian considerations as secondary. International law at the time imposed few effective constraints on states, and national leaders sought to pursue their goals by the means available (Strachan and Herberg-Rothe 2007).

By the middle of the 19th century, changes were taking place that would contribute to a shift in attitudes and the development of new structures and institutions. The increasingly economic nature of warfare, and by implication the growing importance of the role of civilians in winning wars, implied their partial co-option. While they were becoming central to states sustaining a war-fighting economy, the ever more destructive nature of war also meant that they might more often become its victims. Conversely, this period marked an increased tendency for international conflict to be settled by arbitration, a factor that might have encouraged Moynier in his efforts (Brownlie 1963; Brownlie 2002).

In any event, Moynier's proposition was part of wider attempts to regulate international relations and the conduct of war. Yet despite the developing momentum for improved humanitarian standards, in 1872 his proposal for an international court was not greeted with widespread legal or political acceptance. In the absence of a body to establish the tribunal it relied upon the support of states themselves. Perhaps reluctant to curb their own sovereignty or expose their leaders to accountability, states ensured that his plan came to

nothing. However, his efforts mark the clear articulation of the aspiration for an international criminal court, with the intended purpose of bringing perpetrators of atrocities to trial, thus promoting the alleviation of suffering in war.

2.1.2 The world wars and their aftermath

From the end of the 19th century the pace of events quickened. The Hague Peace Conferences of 1899 and 1907 took place against the backdrop of increasing tension in Europe, and developing military technology. They were called to discuss the codification of the laws of war, and led to the Hague Conventions which included agreements on arms limitation, the development of international humanitarian law, and provisions for the protection of civilians in war. The Conventions declared certain acts illegal and imposed duties upon states, but did not provide for the criminal liability and prosecution of individuals.

A decade later, the aftermath of the first world war provided further impetus to efforts to strengthen international law, and the fate of perpetrators of mass crimes again received international attention. The scale of the suffering in the 'Great War' was colossal, and deaths alone are thought to have surpassed nine million military personnel, and six million civilians. Of the civilian deaths, a million or more were the result of the Armenian genocide perpetrated by the Ottoman Empire. Crimes were committed against civilians on both sides, but Ottoman crimes are believed to have been the greatest and most flagrant violations (Beigbeder 1999).

In response to public outrage at these deeds, the Allies' statements prior to the armistice gave repeated assurances that individual perpetrators would be tried for their crimes, yet the Compiègne armistice of November 1918 indicated that none should stand trial. It stipulated that 'no person shall be prosecuted for having taken part in any military measures previous to the signing of the

armistice', thus postponing criminal justice processes until the conclusion of a peace treaty (*Armistice of Compiègne* 1918: Item 6).

The subsequent Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties was expected to investigate such crimes, and to lead to charges against individuals responsible; however, it is not clear whether political interests would ever have allowed it to meet these aspirations. US and Japanese opposition to trials for crimes against humanity and to trials of heads of state complicated the proceedings and weakened the final report, issued on 29th March 1919. It did recommend establishing an international court of representatives of the victors, but also that none should be charged with making aggressive war (Commission on the responsibility of the authors of the war and on enforcement of penalities 1920).

Other national interests further weakened efforts to achieve accountability. German and Ottoman objections to international tribunals on the grounds of the threat they posed to sovereignty constrained the extent to which the Commission's report influenced the subsequent peace treaties of Versailles and Sèvres. The Versailles treaty text proposed individual accountability even for crimes committed in the name of states, and provided for the trial of Kaiser Wilhelm II and German military personnel. However, in the event political influences prevented a trial of the Kaiser, and the subsequent Leipzig war crimes trial in 1921 before the German Supreme Court failed to deliver accountability. Ottoman war criminals similarly escaped justice. The Sevres treaty was superseded by the Treaty of Lausanne in 1923, which unlike its predecessor endorsed Ottoman amnesties in relation to the Armenian genocide. International attention had already turned from dealing with the past, to preventing the spread of Bolshevism following the Russian revolution. Thus, despite the allied victory, the public desire for accountability, and the promises made, in the final event diplomatic considerations prevailed and the principal

perpetrators once again went unpunished.[6] The political expediency of the 1920s may have had its costs. Apparently confident of the continuing primacy of such considerations, in 1939 shortly before the invasion of Poland Adolf Hitler is said to have stated 'Who, after all, speaks today of the annihilation of the Armenians?'[7] (*Treaty of Versailles* 1919; *Treaty of Sèvres* 1920; *Treaty of Lousanne* 1923; Cassese 1998: 2).

Between the wars, efforts were made to establish an international criminal court through the League of Nations, but these failed to gain ratification by a sufficient number of states. It was not until the aftermath of the second world war that further progress was achieved, and in relation to the most serious crimes, strict adherence to Westphalian concepts of sovereignty was tempered by the international legal process.

During the second world war, from 1939 to 1945, over fifty million people died. Of these, over two thirds were civilians, the greatest responsibility for which was borne by German forces. This included of course the extermination of six million Jews and approximately five million others (mainly Poles) in the death camps and elsewhere, and half a million in the east European ghettos from starvation and disease. Japanese crimes were also notable, including gross maltreatment of prisoners of war including their starvation, torture, execution, and use in biological warfare experiments. Though not instigators of the war, the Allies were also guilty of deliberate mass killing of civilians, including the war-time deaths of well over half a million people in the Soviet gulags, and perhaps between 300,000 and 500,000 civilians killed by US conventional and nuclear bombing of Japan (1946; Seldon 2007).

Various diplomatic efforts promoted and detracted from progress on the trial of war criminals. The UN War Crimes Commission (UNWCC) was inaugurated in

[6] By contrast, in economic terms, the post-war settlement did not leave the German people unpunished, and the burden of reparations may have contributed to the origins of the second world war.
[7] Note that the authenticity of this quote is disputed.

1943 with the support of 17 allied nations. However, British and US concerns over their own capacity for independent action, and intention that the commission would apprehend, charge and try war criminals (rather than simply to investigate and record their crimes as they had anticipated), soon resulted in a decline in governmental support, and its dissolution in 1949. Despite this, the UNWCC was able to compile dossiers on over 8,000 alleged war criminals which eventually informed national prosecutions (Maogoto 2004).

The process of establishing international military tribunals was more successful. The Moscow Declaration of 1943 signed by the US, Soviet Union and UK, indicated the allied intention to prosecute the Nazis for war crimes, and set in motion the process that established the London Charter of the International Military Tribunal. The London (or Nuremberg) Charter was signed by representatives of the four major powers, the Soviet Union, the United States, Britain, and France on 8th August 1945, and laid down the laws and procedures by which the Nuremberg tribunals would operate. Trials of the major war criminals were soon underway, with warrants issued against 24 Nazi leaders in October 1945. These were completed nearly a year later with the conviction of 19 defendants, twelve of whom were sentenced to death (Robertson 2006).

The Nuremberg process allowed for prosecutions on four counts: conspiracy (an unprecedented charge more completely articulated as 'participation in a common plan or conspiracy for the accomplishment of a crime against peace'); planning, initiating or waging crimes against peace (another unprecedented charge, except for the failed trial of Kaiser Wilhelm II); war crimes (involving serious breaches of the laws relating to armed conflict); and crimes against humanity (unprecedented at the time, these were crimes such as murder, enslavement and extermination committed against civilian populations). The charges were challenged as *ex post facto* criminalization because the London Charter had been adopted after the crimes took place; however, the judges ruled that it would be wrong to leave the Nazi crimes unpunished. In view of the enormity of the acts, and despite legal objections, in this instance it was the

political necessity to hold at least some of those responsible to account that drove the process of developing international law forward. However, political imperatives also operated to deter some prosecutions, and certain war crimes charges were dropped after evidence of comparable behaviour by British and US militaries was uncovered (Robertson 2006: 248; Schabas 2011).

In the Pacific theatre, the Allies established the 'International military tribunal for the Far East' leading to the Tokyo trials, which commenced at the end of April 1946. Despite drawing on the Nuremberg provisions, the Tokyo tribunals were less independent of political influence. Structured more like a court martial than a court, the charges, proceedings and sentences were significantly influenced by the US supreme commander in the region, General Douglas MacArthur. The 28 defendants were charged with three categories of crime. Class A charges were for conspiracy, and were brought against the highest decision-makers; Class B charges related to the commission of atrocities and crimes against humanity; and Class C charges related to those with criminal responsibility lower in the decision-making processes. The trials taking place over two and a half years and involving judges from eleven nations, resulted in seven death sentences and eighteen prison sentences, sixteen of which were for life. In the event US political desires to reinstate Japan as a major ally in the region were such that all those imprisoned were released on parole or had their sentences commuted by 1957, one later becoming Prime Minister (Maogoto 2004).

Despite the politically influenced nature of the charters and implementation of the tribunals, they nevertheless represented a decisive break with the past and a huge step towards the establishment of new legal norms. Perpetrators of mass crimes had been brought to justice irrespective of issues of national sovereignty, and a precedent of international trials for those responsible for the most egregious crimes had been set.

Subsequent developments at the United Nations helped to secure this advance. In 1946 the procedural and substantive principles informing these tribunals were used by the UN General Assembly to inform the development of international

criminal law. As discussed in section 1.3, the General Assembly of the United Nations later adopted the 'Convention on the Prevention and Punishment of the Crime of Genocide' (UN 1948b), and the definition of genocide was subsequently incorporated unchanged into the Rome Statute of the ICC. By that time the UN Charter had already been signed by over fifty states, Article 55 of which established the protection of human rights as too important to be left to sovereign powers alone (Schiff 2008; Schabas 2011).

This progress in the development and application of international law represents the advance of deontological frameworks, through which wars and violence may be regulated, and the rights and interests of individuals advanced. To the extent that concerns about justice have influenced such matters, the vagaries of consequentialism have been complemented by the clarity of international legal standards and expectations.

2.1.3 The creation of the ICC

The period from 1950 to 1990 saw the development of international criminal law, placing obligations on individuals rather than on states, although neither the UN nor any other international body was generally able to enforce its provisions. Their failure to act was principally determined by Article 2(7) of the UN Charter, which stipulates that 'nothing contained in the present charter shall authorise the UN to intervene in matters which are essentially within the jurisdiction of any state'. Sovereignty was thus upheld, though subject to the proviso that ‘this principle shall not prejudice the application of enforcement measures under Chapter VII’; a significant caveat (UN 1945).

Developments in the way wars were being waged during this period also presented challenges to the existing body of law. Civilian populations, distinguished by their ethnic or religious identity or other factors, were increasingly involved in, or victims of civil wars, including insurgencies and counter-insurgencies, further blurring the already weakened distinction between

combatants and non-combatants. Unlike the preceding Hague Conventions which dealt with the means and methods of warfare, the Geneva Conventions sought to protect the victims of war, including civilians. The 1949 Geneva convention was updated by the 1977 protocols, particularly with reference to these emerging forms of non-international armed conflict. Yet in spite of the obligation on states to punish grave breaches of the Conventions, prosecutions remained rare (Kerr and Mobekk 2007).

During this time, the International Law Commission (ILC) was requested by the UN General Assembly to study the feasibility of an international criminal court, producing a Draft Statute in 1953, and a Draft Code of offences in 1954. The definition of the crime of aggression contained within the latter proved contentious, and this was not resolved until 1974 when a political rather than legal settlement was reached, giving responsibility for this primarily to the UN Security Council (Bassiouni 1987; Kerr and Mobekk 2007). Subsequently it was not until 1981 that the General Assembly requested the ILC to resume its activity, and these efforts were given renewed impetus following the end of the Cold War in 1989 when an initiative of Caribbean and Latin American countries led by Trinidad & Tobago, seeking to address aspects of the international drugs trade, initiated a resolution at the UN General Assembly to renew efforts for a permanent international court. Eventually in 1991, following revision of its 1954 draft, a revised form was sent to Member States for their comments. This later led to the ILC's draft Statute (on procedural and organisational issues) completed in 1994, and its 'Code of Crimes Against the Peace and Security of Mankind' two years later. Both documents were to greatly influence the drafting of the Rome Statute (ILC 1994; 1996).

At the same time that the drafting of the Statute was gaining momentum some movement was also achieved on the issue of enforcement, in part spurred by reaction at the UN to atrocities being committed in the former Yugoslavia. Chapter VII of the UN Charter had always provided the possibility of Security Council sanctioned military intervention in the event of a 'threat to peace and security'. It was the reinterpretation of this power by the Security Council to

include the protection of human rights within the borders of a state that enabled a measure of enforcement to be achieved (1945). By 1992 it was clear that war crimes and crimes against humanity were being committed in Bosnia, and a proposal for a Statute for a court to try war criminals put forward by Lord Owen and Cyrus Vance was given UN endorsement before the end of the year. On 22nd February 1993 the UN Security Council decided to create, as a UN body, a tribunal mandated to prosecute war criminals guilty of crimes committed in the former Yugoslavia since 1991—the first international tribunal to apply modern international criminal law. Borrowing on the Statute and Code prepared by the ILC, Security Council resolution 827 established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993. Its trials in The Hague, including that of Mladić for genocide, are continuing (1993; BBC 2015a).

The genocide in Rwanda that took place a year later provided further impetus. In response to a request from the new Rwandan government, the UN Security Council voted to create the International Criminal Tribunal for Rwanda (ICTR) in November 1994, in a belated attempt to salvage its tarnished reputation. Located in Arusha, the Tribunal was given jurisdiction over serious violations of international humanitarian law committed in Rwanda and neighbouring countries in 1994. Its statute is similar to that of the ICTY, but with provisions reflecting the internal nature of the war (United Nations Security Council - UNSC 1994). Facing none of the complications of issuing warrants into a region still undergoing violent conflict (at least within Rwanda itself) the ICTR was able to target the highest profile perpetrators from the start. However, it also encountered difficulties including obstruction by the Rwandan Government of attempts by the ICTR to investigate crimes allegedly committed by members of the Tutsi minority (Robertson 2006; Kerr and Mobekk 2007).

Four years later the momentum for accountability was sustained. Following a request from the Sierra Leonean Government, the UN passed a resolution to set up a court in collaboration with the Government, to prosecute crimes committed since 1996 in the civil war. The Special Court for Sierra Leone (SCSL) came into being in 2002, and notably the warrants for Foday Sankoh

and Charles Taylor for war crimes were issued a year later. Sankoh later died in custody, while Taylor remained at large until 2006 when he was arrested crossing the border from Nigeria to Cameroon (UNSC 2000; Dorman 2009; Harris 2012).

From the start, the *ad hoc* tribunals faced enormous challenges in seeking to administer new laws, while at all times meeting the highest standards of international justice in difficult circumstances. Their challenges have not only been technical, and they have received considerable criticism in relation to their harmonisation with other modes of transitional justice, and relationship to political settlements (Ainley et al. 2016). Though perhaps not overly well-resourced by international standards, some have faced considerable local criticism on the grounds of costs, their slow progress, and their distant relationship to the communities on whose behalf they have sought redress. Their record thus far on promoting peace and reconciliation has also been questioned. However, these criticisms in part reflect the extremely high expectations placed upon them (Goldstone 1996; Dougherty 2004; Zacklin 2004; Nsanzuwera 2005; Kelsall 2009; Harris and Lappin 2015).

Despite these impediments, tribunals represented significant further progress in developing individual accountability for international crimes. They established a precedent for engagement under Chapter VII of the UN Charter, permitting military enforcement to defend the human rights of civilians in internal armed conflicts in the interests of peace and security; and crimes against humanity were deemed to have taken place in peacetime as well as war. In some respects *ad hoc* tribunal provisions even extended beyond those later incorporated into the Rome Statute. The ICTY excluded the defence of 'duress' which allows for a limited defence on the grounds of superior orders, though it was later reinstated in the Rome Statute. Additionally these tribunals established the structure and mechanisms of an international criminal court, and demonstrated the possible role of the Prosecutor (Mendes 2010; Schabas 2011).

By their nature *ad hoc* tribunals require timely political will to be established in the aftermath of each conflict. They are also subject to political pressures from parties with vested interests and the accusation that they dispense only victor's justice. Furthermore, inconsistencies between tribunals could undermine the process of establishing international norms and the positive deterrent effect that might arise from the presence of a permanent court. These disadvantages contributed to sustaining the momentum for a permanent court (Maogoto 2004).

Such developments in the application of international criminal law took place alongside the final diplomatic moves leading to the creation of the International Criminal Court. In 1994 the UN General Assembly made the decision to press on with ICC establishment using the ILC drafts. The Ad Hoc Committee on the Establishment of an International Criminal Court was formed to take this forward. Issues such as complementarity with national legal processes, and the limits to jurisdiction were discussed, and the statute for the court was combined with the code, to bring the definition of crimes into the same governing document. In the following year the Preparatory Committee for the Establishment of an International Criminal Court (PrepCom) was empowered to progress its development with the participation of member states, NGOs and international organisations. A series of amendments took place between 1996 and January 1998, when a consolidated draft was submitted. This equipped the Rome Conference to finalise work on the Statute, and the 'Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' was convened on 15th June 1998, with the participation of 160 states and approximately 250 NGOs (Schiff 2008; Schabas 2011).

There were a number of groups attending the conference that sought to influence its outcome, but by far the most influential was the group of 'like-minded states', chaired by Canada and numbering 60 at the start of the conference, and including permanent Security Council members Britain and France before its close. In opposition to the other members of the Security Council, they took a common position, critical of aspects of the Draft Statute

and favouring a strong court with independent powers. In particular, they sought jurisdiction of the court over genocide, war crimes and crimes against humanity; the elimination of a Security Council veto on prosecutions; independent power for the Prosecutor to initiate investigations *proprio motu*; and a prohibition of reservations to the Statute. Through their numbers, organisation, and widespread geographic spread, they were able to achieve significant influence, and chaired most of the working groups during the conference (Schabas 2011).

The conference process charged a number of working groups to discuss specific issues, and bring proposals back to the Committee. The final draft was presented on 17th July, the last day of the conference, requiring a two thirds majority to carry. In the event it was passed by 120 votes to seven (opponents including the US, China and Israel), with 21 abstentions. The Court itself finally became operational on 1st July 2002 following its ratification by its 60th State Party (ICC 2013a).

In theoretical terms this development significantly further extended the deontological frame of international law. The remit of the Court, to address these most serious crimes, and the degree of independence secured for its actions, defined it as a significant advance. Previously, political and diplomatic systems could at best be used to advance justice by promoting consequentialist concerns alone, but such processes have provided little assurance that perpetrators, if sufficiently powerful, would be subject to codes of behaviour and punished for transgressions. The new power of the Court presented an opportunity to address this situation internationally for the first time. The independence of the Court placed it largely outside the political reach of such individuals. The creation of the Court was a landmark event in the advancement of deontological justice norms.

2.2 Operation of the Court

2.2.1 Aspirations

> The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law. (Annan 1998)

The UN Secretary General was one amongst many heralding the ICC's creation as a huge step forward for human rights. Human Rights Watch itself, which had campaigned long and hard for the ICC's establishment, articulated the views of a broad swathe of the NGO community when the Court received its 60th State ratification four years later, stating 'This is an historic moment for the cause of human rights and international justice.' (HRW 2002c). Aspirations for the Court were thus high, and reflected a belief that its creation and functioning as a legal body would have far-reaching effects well beyond its legal remit.

The local processes of bringing perpetrators to justice was expected to be aligned with the goal of fully entrenching the norms of international law. Legal enforcement would be entwined with the promotion of human rights for all; the Court's efforts would benefit the victims of war and atrocities, and help communities recover. As Amnesty International stated in 2000, 'Victims and their families will have the chance to obtain justice and truth, and begin the process of reconciliation' (Amnesty International - AI 2000: 1). The intervention of the Court in individual cases was thus anticipated to be in the interests of civilians caught up in these terrible events. The arrest and trial of perpetrators would draw a line under their suffering, and bring at least some measure of justice as well as the foundation for future reconciliation. In this way organisations committed to promoting the rights of individuals, such as Amnesty International, with its aim of 'effective action for the individual victim, global

coverage, the universality and indivisibility of human rights', saw their cause advanced through the Court's establishment (AI 2002a: 4).

The rule of international law was to be furthered through a process of criminal law enforcement, by which the Court could issue arrest warrants into ongoing wars and conflict zones around the world, bound not by diplomatic constraints or the nuances of local political considerations (which had for too long delivered impunity to the most egregious perpetrators), but by the principled clarity of international legal standards and their enforcement. Communities on the ground would be the primary beneficiaries of this process, their interests associated with, and promoted through, the furtherance of international justice. It was perceived by many as an achievement by and for global civil society (Glasius 2006).

With the anticipation that a fresh deontological approach would also yield consequentialist gains, and anticipating the melding of legal enforcement with human rights promotion, the signatories to the Rome Statute were acting in many respects true to Moynier's original vision. Articulating their intentions in the Preamble to the Rome Statute, states declared themselves to be:

> Mindful that during this century many millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.
> Recognizing that such grave crimes threaten the peace, security and well-being of the world [and …]
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. (*Rome Statute of the International Criminal Court* 1998)

2.2.2 Jurisdiction and crimes

Given the goals proclaimed in the previous section, it is now appropriate to outline the structure and powers invested in the Court to enable it to deliver on its mandate. The following section provides a very brief account of its legal, temporal, and geographic jurisdiction, the organs of the Court, the means through which investigations may be initiated, provision for victims, and key checks and balances articulated in its Statute.

The jurisdiction of the Court and admissibility of cases is defined in the Rome Statute, and is limited not only to the gravest crimes, but also temporally, geographically, through complementarity with national courts, and by the means of referral of cases.

The crimes named in the Statute require some elaboration. The first, 'genocide', involves an intent to destroy a 'national, ethnic, racial or religious group' by means such as killing, causing physical or mental harm, inflicting conditions of life calculated to bring physical destruction, or the prevention of births or removal of children (*Rome Statute of the International Criminal Court* 1998: Articles 5-6). The second, 'crimes against humanity', falls into the remit of the Court when it is part of 'a widespread or systematic attack directed against any civilian population'. The Statute outlines similar acts to those relating to genocide, but also other offences—specifically, including rape and other sexual crimes, persecution, enslavement, deportation or forcible transfer of populations, imprisonment or other severe deprivation of liberty (Article 7). Article 5 identifies 'war crimes' as falling within the Court's jurisdiction. These are stipulated at some length and include many of the acts previously mentioned, while also making reference to breaches of the Geneva Conventions and 'serious violations of the laws and customs applicable in international armed conflict' (Article 8).

Though there were efforts to include the crime of aggression in the 1998 Statute, its definition could not be agreed, and in the end it was named only with

an indication that the Court would exercise jurisdiction over aggression only 'once a provision is adopted [...] defining the crime [...]'. Article 8*bis* was added at the 2010 review conference (subject to the amendment process indicated in Article 121), and prohibits the 'planning, preparation, initiation or execution [...] of an act of aggression […] which constitutes a manifest violation of the Charter of the United Nations' (*Rome Statute of the International Criminal Court* 1998: 9).

Temporally, the jurisdiction of the Court is restricted to crimes committed after its creation (Article 11), following its 60th state ratification. In the event, the Statute entered into force on 1st July 2002 for those states that had signed. Geographically, once a state has ratified the Statute, the Court has jurisdiction over the stipulated crimes committed on its territory by nationals of any state, and by nationals of that state committed anywhere. Subsequent state signatories thus extend the jurisdiction of the Court following their own ratification. Additionally, states that have not yet signed or ratified the Statute may accept the jurisdiction of the Court with respect to a specific crime (Article 12.3).

Even where these conditions are met and the Court has jurisdiction, a case is only admissible when the relevant state itself is 'unwilling or unable' to act (Article 17). The Court's activity is thus envisaged as complementing and enhancing national judicial processes rather than superseding or supplanting them.

Vested with this task, the Court's purpose, composition, jurisdiction and administration are outlined with some clarity in the Rome Statute. In order to appreciate the powers of the Court and understand its actions and approach to cases, the organs of the Court are now outlined, with a summary of their function.

2.2.3 Structure and function

The Presidency oversees the administration of the Court, with the exception of the Office of the Prosecutor. This includes three elements: the Pre-Trial Division, the Trial Division, and the Appeals Division. The Pre-Trial and Trial Divisions, which may consist of one or more Chambers according to the needs of the Court, are responsible for the judicial functions of the Court (Articles 38-39).

The Pre-Trial Chamber is required to assess applications for the issue of arrest warrants from the Prosecutor and, if approved, issue them. It is required to carry out tasks necessary to assist in the preparation of the defence, and provide for the protection of victims and witnesses, and any others summoned or arrested by the Court. It is responsible for determining whether there are sufficient grounds to proceed to trial. It must also protect evidence and deal with states, including for example seeking their co-operation, or protecting information relevant to national security (Articles 56-61,72,82).

The Trial Chamber is responsible for the management of the trial and sentencing itself. It must ensure that the trial is fair and carried out within a reasonable time period, that the rights of defendants are observed, and that victims and witnesses are adequately protected. Its responsibilities for the management of the trial include providing evidence (and ruling on its admissibility), summoning witnesses, protecting confidential information, and recording the proceedings (Articles 63-65,72,74,76,81-83).

Appeals by the prosecution or the defence against acquittal, conviction or sentence, are dealt with by the Appeals Chamber. Decisions of the Pre-Trial Chamber, for example with regard to jurisdiction or admissibility, may also be appealed. Additionally, the Chamber deals with certain internal matters of the Court, for example the consideration of whether, due to concerns about impartiality in a case, the Prosecutor might be disqualified from hearing. In carrying out these duties the Appeals Chamber has all the powers that the Trial

Chamber would normally possess to conduct the process (Articles 18,36,82-84).

The Office of the Prosecutor (OTP) acts as a separate organ of the Court, independent from the Presidency and its other Divisions. It is responsible for receiving (or instigating) referrals, and assessing these to determine whether an investigation should proceed. The OTP is also responsible for carrying out any ensuing investigation to determine whether arrest warrants should be issued, and for taking forward subsequent prosecutions (Article 42).

The Registry is responsible for non-judicial activities of the Court, and includes the Victims and Witnesses Unit (VWU). In consultation with the Prosecutor this unit 'provides protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses' (Article 43). Consideration of the rights of victims has not generally been prominent in international criminal or humanitarian law, but perhaps due in part to the growing prominence of the restorative justice discourse, their interests have started to be recognised. The Security Council resolution establishing the ICTY acknowledges that victims' rights to seek compensation should not be compromised by the Tribunal's proceedings (Schabas 2011). In contrast to this modest provision, the Rome Statute made a clear break with the past. Most importantly, the Statute provides for victims to take a much greater part in the proceedings, and to express their views and concerns. Since the Court's launch, hundreds of victims have applied to participate in hearings, placing a significant burden on the Court. As well as providing for participation, the Statute allows for consideration of the issue of reparations, including determining the degree of loss a victim may have suffered, seeking restitution from a convicted person by requesting States to seize proceeds, property and assets (ibid). These powers, overseen in part by the semi-autonomous Trust Fund for Victims, represent significant progress in considering the interests of victims in international criminal law. Such measures perhaps reflect the underlying intention that the Court should strengthen the profile of victims'

concerns relative to the historical prominence of political considerations, and thus further contribute to the prevention of human rights abuses through ending impunity (Article 75).

In situations that are both under the Court's jurisdiction and admissible, there are three ways in which an investigation by the Court may be instigated: referral to the Prosecutor by a State Party; referral to the Prosecutor by the UN Security Council under Chapter VII of the UN Charter; and instigated by the Prosecutor him/herself *proprio motu*. This third option gives the Prosecutor the power to intervene to address crimes independent of the wishes of the Security Council, an important provision in the creation of an independent Court (Article 13).

In a number of additional respects the Statute reflects the determination of its drafters to put an end to impunity. The Prosecutor may decide not to proceed if the investigation 'would not serve the interests of Justice' (Article 53). There are clearly circumstances in which the Prosecutor might for legitimate reasons wish not to go forward. The circumstances of an investigation might, due to jurisdictional restrictions for example, cause the Court to intervene in a conflict to address some crimes but not others in a way that adds new asymmetries to perceived grievances and injustice in a conflict; an unduly rigid insistence on the application of criminal justice norms might in some circumstances detract from the Court's broader mission. Yet mindful of how authority might, under political influence, once again be misused to deliver impunity for the most powerful, the Prosecutor's power was limited. A decision not to continue with an investigation must be confirmed by the Pre-Trial Chamber, which has no reciprocal power to seek to halt an investigation itself. There is thus a mechanism by which an investigation may be halted based upon the view of the Prosecutor, but only subject to approval by the Pre-Trial Chamber (ibid).

In addition to a decision not to proceed by the Prosecutor there are also means to defer an investigation's commencement or proceeding. In a concession to the US, French and Chinese delegations, Article 16 of the Statute ultimately puts the Court under some political control. Using a resolution adopted under

Chapter VII of the UN Charter, the Security Council may 'request' that an investigation or prosecution is deferred for a period of 12 months, after which a new resolution must be adopted if the ICC's process is to be further delayed. Such a request would be mandatory upon the Court, and so this Article provides a route through which perpetrators might escape justice, though only so long as they retain sufficiently widespread international political support or leverage to sustain annual deferral of their case by the Security Council.

Despite the expectation that the Court would intervene in ongoing conflicts where atrocities of the gravest nature are being perpetrated, the Statute pays relatively little attention to the apprehension of suspects. Lacking the means of achieving arrest itself, the Court must rely on others working on its behalf. Part 9 of the Statute, comprising Articles 86-102, addresses international co-operation and judicial assistance. These oblige States Parties to co-operate with the Court in various ways, while Non-States parties may also be invited to assist. Such issues include the 'surrender' of suspects to the Court, their travel, extradition, and related administration and communications to and from the Court. It also deals with matters relating to arrest, particularly provision of the necessary documentation and issues concerning detention in custody. Article 93 mentions the identification and location of the suspect, their questioning, and the seizure of evidence. No mention is made of the manner of the seizure of the suspect themselves, though the Article 93.1(l) indicates the requirement for States parties to provide 'any other type of assistance which is not prohibited by the law of the requested State[…]', which may include action by its armed forces. Article 97(b) anticipates that the surrender of a suspect to the Court by a State may not be possible, but only on the basis of their location not being known (or that the requested person is not the one named on the warrant); not for other reasons pertaining to their being significant commanders in conflict zones, as might have been anticipated. Part 10 of the Statute then deals with 'enforcement', but this term refers only to the application of the sentence itself. Perhaps reflecting the relative ease of enforcement within states due to their monopoly on violence, the means of moving from issuance of a warrant to the achievement of arrest is largely absent from the Statute.

2.3 Anticipated impact of the Court

This preceding technical description of the structure and function of the Court does little to articulate the relationship of its activities to its purpose. The mechanisms by which actions of the ICC are envisaged to achieve its aims are now outlined.

2.3.1 Retribution

The moral obligation and/or legal duty to administer retribution is prominently articulated in the Statute itself; however, the means by which it is expected that international courts will contribute to the establishment of broader justice objectives are relatively little discussed, though notable exceptions exist (*Rome Statute of the International Criminal Court* 1998: 1; Clark 2008b; Clark 2008c; Branch 2011: 181; Rodman 2012: 69). The criminal justice process operates principally in retributive mode, impartially determining the guilt of perpetrators and delivering proportionate punishment. Through these means the disapproval of society is demonstrated, social behaviour regulated, and the power of the state (or other body) affirmed. Though the retributive mode does not exclude other justice elements, including reparative or restorative efforts for example, it is clear that in the case of criminal law justice is seen to be done when the correct punishment is appropriately delivered.

Retribution, though, is not the only mechanism by which the ICC is thought to promote international criminal justice, and various other effects are articulated in the literature.

2.3.2 Deterrence

Most prominent of these is deterrence—the belief that by bringing the most notable perpetrators to retributive justice, those individuals themselves as well

as others in future (specific and general deterrence as Vinjamuri describes it) will be deterred from committing crimes (Vinjamuri 2010: 194). The credible prospect of arrest and prosecution is expected to deter individuals from planning or committing international crimes, knowing that such acts will no longer be tolerated by the international community. Through deterrence future cycles of violence may be averted, and atrocities prevented (HRW 1998: 1). Additionally, the mere prospect of ICC investigation or arrest warrants might itself deter, even without the Court's formal engagement or effective prosecution. It has been suggested that in a conflict scenario, warrants could contribute to a peace-making process, in which perpetrators are brought to justice even during the hostilities themselves. An intervention might serve to stay the hand of others and bring a moderating influence on events. By removing those who are most culpable, peace may be attained not after justice, but through it (Ocampo 2006b: 6; Akhavan 2009: 628-629; Vinjamuri 2010). Anticipating that humanitarian standards will increasingly be upheld and the norms of international criminal justice extended, others have emphasised a longer-term impact in relation to deterrence, with cumulative benefits stretching forwards over many years (Ocampo 2006b; Vinjamuri 2010: 194). Rodman has considered the mixed evidence for the efficacy of deterrence-based approaches, but in any event effective deterrence rests upon credible enforcement, and the Court's performance in this regard depends on its ability to galvanise others with enforcement capacity to this end (Rodman 2012). Action by the Court will of course only provide a deterrent effect if its retributive punishment is worse than would otherwise have been the case.

2.3.3 Marginalisation

In addition to impacts through retribution and deterrence, the ICC may contribute towards the marginalisation of perpetrators. Citing the Milosevic, Taylor, Karadzic, and Uganda cases (the latter to be discussed) Human Rights Watch argue that issuance of warrants can affect the power dynamics of a situation, by discrediting the suspect and contributing to their isolation or

stigmatisation. It may make denials that a crime has occurred less credible, and in the longer term contribute to the creation of a historical record based on evidence for crimes. Arrest warrants might also establish practical difficulties for perpetrators, such as obstructing national or international travel, or creating uncertainty around their fate should they venture abroad. A further impact could be the increased international attention brought to bear upon a conflict as a result of ICC engagement. Each of these mechanisms could contribute to a process that promotes a dynamic for peace (HRW 2009b). Akhavan cites the Uganda case specifically as an example of this phenomenon and his evidence will be examined in later chapters (Akhavan 2009: 641-643).

Vinjamuri describes a related process of inducement, to which Hayner has also referred. This proposes that warrants encourage perpetrators to negotiate, as they may face the prospect of trial even if their military campaign is successful. However, this mechanism is not fully articulated by either author, and as the prospect of trial following indictment must remain whatever the outcome of negotiations, the motivation to talk and thus potentially hasten trial is not entirely clear. The Uganda case is given as a pertinent example by both authors, and this will also be discussed in section 6.3 (Hayner 2009: 17; Vinjamuri 2010: 195).

2.3.4 Individualisation of guilt

An additional means by which the ICC may further justice is through the individualisation of guilt. When responsibility for atrocities is perceived to rest with communities or groups who are not brought to justice, resentments and hatreds may be fostered or sustained, and the seeds of future conflict planted. As Human Rights Watch explain, 'Without individualizing guilt, the notion of collective responsibility for crimes has greater resonance, and it is easier for blame focused on a group to be passed from one generation to the next.' (HRW 2009b: 6). The perception of culpability for injustice residing with a very small number of individuals may be helpful at different levels. Criminals are identified

for retribution, which may provide deterrence; the majority are absolved or at least escape punishment, facilitating the possibility of stability; and potentially, societies may through this process be better reconciled. The international criminal justice system identifies individuals most responsible for atrocities for retributive punishment, providing accountability and challenging narratives that deny crimes and culpability on the basis of evidence. Richard Goldstone, the first joint Prosecutor for the ICTY/ICTR has expressed this in an interview, reported as follows:

> Such interethnic violence usually gets stoked by specific individuals intent on immediate political or material advantage, who then call forth the legacies of earlier and previously unaddressed grievances. But the guilt for the violence that results does not adhere to the entire ethnic group. Specific individuals bear the major share of the responsibility, and it is they, not the groups as a whole, who need to be held to account, through a fair and meticulously detailed presentation and evaluation of evidence, precisely so that the next time around no one will be able to claim that all Serbs did this, or all Croats or all Hutus. (Weschler 1995)

Whether or not Goldstone's view that a few individuals bear so much more responsibility than other active perpetrators is invariably the case, the individualisation process clearly performs a regulatory function in identifying a few for retributive punishment intended to express society's disapproval, deterring others, and absolving the rest.

The individualisation of guilt may also contribute to the removal of spoilers from a conflict situation. If some individuals are unable or unwilling to negotiate, warrants that lead to their arrest may have the effect of allowing negotiations to proceed. In a reversal of one argument often put in opposition to ICC intervention, which proposes that warrants create spoilers who are unwilling to negotiate themselves into a trial, advocates for the Court have proposed that if there is adequate enforcement to remove the spoiler from the negotiation then

the prospect of successful talks can be promoted. Critical to this mechanism's (and thus the Court's) effectiveness for a positive rather than a negative outcome is the capacity to efficiently effect arrest. The implications of securing this necessary capability is central to the analysis forthcoming in this text.

2.3.5 Complementarity

It is hoped that the complementarity of national and international criminal law enforcement enshrined in the Statute can give new momentum to states' own legal processes. One means by which the Court's influence is expected to be projected is through the strengthening of national legal responses to mass crimes. In the first instance national courts have an obligation to prosecute perpetrators of serious international crimes, and it is only where this duty is not fulfilled and the state's legal systems are either unwilling or unable to prosecute, that the ICC has jurisdiction. In order to act in such circumstances states must refer their situation to the ICC or otherwise relinquish their responsibility for prosecution, thereby offering jurisdiction to the Court (Akhavan 2009; HRW 2009b: 13). Furthermore, through such interventions justice systems around the world may be emboldened by the actions of the ICC; their hand may be strengthened by the prospect of possible ICC intervention should they fail to act against their own perpetrators (Ocampo 2006b). Human Rights Watch claim (though they provide no evidence) that international criminal justice interventions have indeed had a broad and far-reaching effect, strengthening courts' legal process, building capacity and emboldening those who seek to uphold the rule of law. They perceive that as a result of the ICC's example, through the engagement of its staff and those working for other accompanying criminal justice organisations, states' own legal system's capacity to address crimes will be strengthened. At the same time it is recognised that such capacity building is a long-term project that requires more than symbolism to be effective (HRW 2009b: 198; Vinjamuri 2010).

2.3.6 Furthering the norm—creating the 'era of enforcement'

While each of these mechanisms may have value in itself, when combined they contribute to an overarching goal of furthering the norms of international justice, and an expectation of prosecution for international crimes. This case was articulated by ICTR Prosecutor Hassan Bubacar Jallow, who gave an instructive account of the various means by which the Tribunal was thought to have contributed to the furtherance of justice following the genocide, and provided a foundation for the ICC's establishment (Jallow 2008). Akhavan and others have further emphasised the societal role of such expectations, promoting the 'stigmatization of crime through judicial processes, leading to the reinforcement of habitual lawfulness' (Akhavan 2009; Mendes 2010: 628). As the former ICC Prosecutor has pointed out, it may be erroneous to measure the Court's success by prosecutions achieved; its success may lie in the climate that it has succeeded in creating, despite the lack of prosecutions at international level, or their prevalence at national level. Some might question whether this situation has arisen already from so few successful prosecutions, and whether, in these early stages at least, successful prosecutions could form one measure of progress in relation to the Court's claim to be furthering its own norms. However, the possibility of success without a significant number of prosecutions must be acknowledged (Ocampo 2006b: 10).

In theoretical terms, it may be observed that the process of advancing the new norms of international criminal law is deontological in itself. The law will be applied according to the Statute, as determined by the Prosecutor and the Court, who will follow due legal process. The anticipated impacts of these actions is expected to extend far beyond deontological compliance alone. They include marginalisation or removal of perpetrators, deterrence of future crimes, strengthening of good governance, and the establishment of international standards of behaviour in relation to international crimes, and presumably the advancement of human rights. The success of the Court's deontological process, it is argued, will be measured by its consequences.

If the vision of an international rule of law that protects all and deters potential perpetrators from committing mass crimes is a straightforward and compelling one, the path towards this goal has also been perceived as uncomplicated, at least in principle. Warrants for arrest will simply be issued into situations, based upon the crimes committed, within the Court's jurisdiction. Through this most linear of strategies, by the threat or reality of prosecutions, the new climate of global accountability before the law will be achieved. This ambition has been characterized as the 'era of enforcement' (Robertson 2006: xxxiii).

2.4 Review

Resting upon the identification of the nature of ICL, Chapter 2 has traced the development of the ICC. From its origins in the late 19th century following the impetus of the horrors of the France-Prussian War, through the Nuremberg trials and the Special Courts over a century later, the emergence of the Court was observed. The mode of its operation was also articulated, as determined by its Statute and other documents. Lastly, the means of its anticipated impact were analysed, culminating in the vision of its international enforcement and the ending of impunity for perpetrators of international crimes. The next chapter considers this ambition in situations of great volatility—the principal context of its likely operations.

Chapter 3 The pursuit of international criminal justice in volatile environments

3.0 Introduction

For any new venture, the moment prior to commitment is significant. Poised between theory and practice, like a majestic ship on a slipway, there is an opportunity to take stock. We may appraise the prospect and anticipate events, prior to an irrevocable act. Such a hiatus is an occasion upon which to observe clearly the qualities of the craft—to consider its ballast and trim—seeking to ensure that forthcoming events hold few surprises. Planners and implementers of the Statute may well have been impatient for the launch. Informed by an understanding of the nature of justice, the specific qualities of ICL and the design of the ICC, they would have been keen to witness its capabilities, their eagerness perhaps sharpened by the urgency and importance of the task.

In this chapter, before the transition from theory to practice, there is a parallel opportunity to appraise the project and its suitability, so that its performance may be better understood. Others have also applied themselves to this task, and anticipated the deployment of ICL into the new, volatile environments of the Court's interventions.

> Some dilemmas and tensions that the ICC faces are rooted in more particular moral values and objectives. First, the Court is premised on legalism, the idea that problems in the political domain should be settled on the basis of 'impartial judgement, according to rules,' as Judith Shklar writes (1964). Legalism is undoubtedly appropriate for criminal justice problems. However, the ICC operates in a very different political and institutional context from criminal justice systems within states. (Shklar 1964; Franceschet 2012b: 55)

Having analysed the nature of justice and its relationship to ICL, this study now turns to an appraisal of the ICC, to identify how this new institution might be anticipated to perform in practice.

3.0.1 Volatile environments

The Court's remit to address the most serious violations of human rights means that it will most often intervene in environments where atrocities have taken place—contexts that are more likely to be loaded with political and moral complexity. These may include states affected by war or insurgency, and regions experiencing political turmoil, economic collapse, environmental disaster or humanitarian crisis. While facing such challenges, these areas may be subject to a plethora of local, national or international interactions and dynamics that work across multiple domains. These are the volatile contexts into which international criminal justice is to be extended through the engagement of the ICC.

Such regions may present significant practical challenges for the Court, especially in relation to effecting arrest, where some or all parties may have their authority contested and their legitimacy questioned, often with good reason. Engagement in such complex circumstances may not always be straightforward, and actions in one domain may have far-reaching consequences in others. The strict application of the law applied in these contexts may sometimes be compatible with political, humanitarian, security or other justice initiatives, but this will not always be the case. Nouwen and Werner for example have argued that the ICC's own political dimensions should be acknowledged (Nouwen and Werner 2010). The following sections in this chapter analyse the nature of some theoretical and practical complications that arise.

3.1 Theoretical challenges

3.1.1 Moral imperative as a foundation for action

A significant driver behind the move towards the extension of international criminal justice has been the principled requirement to act against those most responsible for committing mass crimes. The enormity of human suffering instigated by perpetrators of international crimes has given impetus to this notion, and this view has been prominently articulated in relation to the Nuremberg Trials and again in the Preamble to the Rome Statute: '[…] unpunished criminal offences on a massive scale are an affront not just to individual victims but to the moral integrity of the larger world society.' (Franceschet 2012b: 55). The felt need to secure legal justice has been a powerful motivator and continues to engender support for the cause (Crane 2005; ICC 2010b; HRW 2011b).

Clark alludes to this, and takes the discussion a step further, when he states in relation to the ICTR:

> The fundamental questions of post-conflict institutions—whether, and why, it is necessary to punish perpetrators of mass crimes (and the connected question, whether amnesty rather than punishment may ultimately better facilitate peace, reconciliation, truth or some other goal)—suggest the centrality of questions of justice in this context[…] Post-conflict legal institutions, such as the ICTR, are trapped uncomfortably between backward- and forward-looking pursuits, punishing perpetrators of past crimes while claiming—though usually failing to articulate precisely how—punishment will contribute to reconstruction or reconciliation. (Clark 2008b)

Thus the impetus for an international criminal trial rests significantly on 'backward-looking' concerns about the just nature of proportionate retributive punishment. This conviction may be so deeply held that the requirement for additional 'forward looking' consequentialist justification, and an evidence base upon which such a view might rest, may seem extraneous. However, as discussed in Chapter 1 and indicated by Clark, such a perspective also contributes to the rationale for ICL. By their nature, claims for legal process concern anticipated future benefit to wider society, and the maintenance and extension of normative standards. They go beyond case-specific circumstances to embrace a universalist view with presumed consequentialist benefits. The expectation is that ICL will be appropriate and effective, and that through its global application and an end to impunity, broader justice benefits will accrue.

Now that there is a growing body of evidence from international criminal law cases and contexts, champions and detractors of the extension of ICL should welcome the opportunity for independent scrutiny of the Court's impacts. Mechanisms by which the ICC might be effective, or more effective than other approaches, can now be assessed through its results. Given the high stakes associated with interventions in these environments, and the potentially grave consequences of ill-judged actions, there is an urgency to this task. With ramifications well beyond the legal realm, the Court will necessarily find itself exposed to scrutiny from many perspectives. These will include those with differing concepts of justice and its moral foundations; advocates for less principled, more evidence-led approaches targeted on the broad consequences of intervention beyond the legal domain; and proponents of methods led more by consideration of context or outcome than by the desire for a more deontological approach. The foundation of the Court's case for intervention rests upon the notion that above all these situational complexities, there is a universal imperative for the Court's engagement, upon which the 'moral integrity of the larger world society' depends.

3.1.2 The overarching role of ICL as a binding framework

The Court is not only committed to addressing the past in retributive mode, but also to moulding ongoing interventions around the priorities of individual criminal case law. As the Prosecutor has explained:

> With the entry into force of the Rome Statute, a new legal framework has emerged and this framework necessarily impacts on conflict management efforts […] Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute. (Ocampo 2007b: 4)

On the then-Prosecutor's view, this framework extends to all political and security interventions in these contexts by signatory states, and by the international community including the UN and its various organs. As discussed, wherever possible the enormity of the crimes considered by the Court warrant their being addressed through legal process; however, international criminal justice interventions are not designed to resolve the situations in which such crimes take place (ibid). The former Prosecutor's view seemed initially to support a coordinated approach with other agencies and a consequentialist perspective with regard to managing multiple interventions in conflict contexts (Ocampo 2003). However, this has not been sustained, as Rodman has observed (Ocampo 2007b; Rodman 2012: 59). Despite its broad ambition to contribute to the global furtherance of human rights, the Court can only engage the legal aspect of a situation. With its ability to impose its own paradigm over other parties, the ICC has a new overarching role. Henceforth its criminal justice mandate sets limits for all manner of international action in conflict contexts. The operation of an institution with a focused legal perspective but much broader powers creating the possibility of significant impact beyond its area of concern and expertise, has the potential for unintended consequences. This merits critical interrogation (Mamdani 2010).

One aspect of the new legally framed international approach is the prohibition of peace deals that would offer amnesty for perpetrators of international crimes in return for an end to hostilities, demobilisation, or other co-operation (Hayner 2009). This is a decisive departure from practice that preceded the ICC's creation. As we have seen in Chapter 1, the UK government for example, now a strong proponent of ICL and a signatory state of the Rome Statute, resolved its own violent internal conflict through the Good Friday Agreement (1998). This provided for the release from prison of convicted paramilitary prisoners on both sides. Impunity for the few was part of the solution that delivered peace and security to the many. South Africa has also ratified the Rome Statute, yet its own Truth and Reconciliation Commission, offered immunity from prosecution in return for testimony (*Truth and Reconciliation Commission Report of South Africa* 1999). Such a process would no longer be legal in the case of international crimes (or arguably workable in the context of an ICC intervention). Where international arrest warrants are issued instead, such solutions are no longer legal; signatory states are obliged to implement arrest by those means at their disposal (*Rome Statute of the International Criminal Court* 1998: Articles 86-99; Cassese 2008: 349-351). The issuance of an ICC warrants thus precludes significant other options for conflict resolution, prioritising the arrest of suspects *whatever else* may accompany it (the limited options for removing warrants are discussed in 2.2.3).

Secondly, other activities by the international community are constrained. Once warrants are issued, enforcement efforts to achieve arrest must be prioritised by the international community wherever they conflict with other activities. This is the case whatever the likely impact, for example upon efforts to enhance human rights, security, or good governance (Ocampo 2006a: 3; Hayner 2009). This may have widespread consequences relating to multiple types of engagement. Efforts to build trust, for example with warring factions, possibly including those for whom warrants have been issued, those who fear arrest, or those associated with them, may be affected. Agencies carrying out work for humanitarian aid, justice in its broader senses, or economic and social

development, may find their efforts impaired. This would be particularly the case if they are perceived to be under the influence of signatory state actors, UN agencies, or other international bodies legally bound to assist the ICC. Trust in, and relations with, any party that suspects believe could be under the Court's influence will be affected. The terrain for all justice and human rights interventions, and much more besides, is profoundly altered (Ocampo 2007a: 4; HRW 2009b).

The ICC thus raises the stakes and narrows the considerations. Once warrants are issued, the legal commitments of engaged states and international agencies determine that henceforth they become committed to retributive justice enforcement measures, whatever their previous role.

3.1.3 The normative framework and its implications

This study has so far argued that the engagement of the Court is to a significant extent founded upon an expressed moral imperative, and provides an overarching, binding framework within which other interventions must henceforth take place. Peace deals can no longer provide impunity, and international engagement must be framed by the requirements of international criminal law enforcement. The possibility that the ICC's legal approach to a case may have consequences aside from the case itself, and that these effects may be outside the remit of the Court and beyond the legal domain, has been acknowledged.

3.1.3a A normative process

The Court also brings normative means as well as ends. Investigation, issuance of warrants, arrest, trial and retributive punishment are prescribed. Only limited variations in this process are permitted, at the discretion of the Prosecutor (Ocampo 2006b: 5). It is anticipated that this particular approach to ending impunity is almost as universally relevant as the desirability of ending impunity itself.

It may be argued that this rather linear strategy is likely to be more effective in some circumstances than in others. If independent analysis identifies circumstances where retributive justice processes are likely to promote the restoration of peace, security and justice more broadly, that may strengthen the case of the ICC's normative project. Analysis that indicates that such processes are unlikely to be effective, for example where retributive justice efforts have already stoked violence, will raise difficult issues. At stake may be the immediate interests of communities affected, or the longer-term prospects for security and good governance. A third possibility is that the Court's interventionist mandate may adversely impact the strategic interests of a powerful state. ICC interventions may be particularly controversial in contexts of extreme and widespread violence. In any event, the normative process of the application of ICC warrants is intended to be universally appropriate.

3.1.3b A shift from consequentialism

This discussion underlines the key issue of consequences, introduced in section 1.2.2. In addition to its universal remit, ICC engagement also signals a departure from consequentialist considerations. In relation to domestic cases, the application of legal process with the prioritisation of deontological process that that entails, is familiar. Notwithstanding the ameliorative influences that jury trials, non-mandatory sentencing tariffs, or pleas of mitigation may offer in terms of allowing some flexibility to take circumstances and consequences into account within the criminal justice system, the introduction of the Court that projects ICL into new contexts represents a markedly stronger emphasis upon deontological ideas of justice. In volatile environments, particularly those where the outcomes of action or inaction may be extreme, the motivation for international interventions has often related to political interests, ideological conviction or (most commonly in relation to justice) consequentialist concerns for the outcome. Those seeking to advance justice have, at least in theory, considered the likely consequences of their interventions, and engaged with others to inform their activities through an understanding of local context. Often agencies have, as a minimum, aspired to adapt their programmes for different

contexts to achieve particular results. This move towards greater contextual understanding and more locally informed programming has been a central part of the development and humanitarian intervention discourses for some decades (Chambers 1983; Chambers 1997; Anderson 1999; Evans 2009; Schiff 2012).

Now under the aegis of ICC warrants, such actors can still carry out these functions but only so far as they fall within the paradigm of the imposition of international criminal justice. ICC actions against individual perpetrators set parameters for other activities, shape the context, and mark a significant shift to deontological engagement. Now, significantly, the framework within which all must now work is not context-specific but normative. It is applied not in a manner based on its likely consequences, but upon the application of dispassionate legal considerations, grounded in statute and the impartial application of its process. Long-term considerations of the consequence of its activities fall beyond the case-specific circumstances and the Prosecutorial remit. For these reasons the intervention of the Court is likely to provoke some debate, and while it may not within its own processes analyse the consequences of its warrants, it is desirable and even essential that others should do so.

3.1.3c A depoliticised focus on criminal acts over systemic justice issues

The Court's anticipated engagement in conflict scenarios and in unstable regions also carries with it the imperative to address identifiable acts defined as crimes as a priority over structural issues, setting limits within which the latter may be tackled. The Prosecutor is not empowered to consider systemic injustice as such, except when it can be shown to constitute the gravest international crimes, and even then only when individual(s) might be held to account (*Rome Statute of the International Criminal Court* 1998: Article 25). The occurrence of political and economic marginalisation and multiple other forms of denial of human rights are less likely to come to the attention of the Court than conspicuous events such as atrocities, yet these structural issues may be significant contributors or fundamental to the dynamics for conflict. Tried by the SCSL, the case of Charles Taylor is pertinent in this regard. His

undoubted crimes were committed in a political context, and the frame that was brought through his arrest to resolve those issues was a narrow one (Harris and Lappin 2015). More generally, the Court's framing of an overarching paradigm for international interventions in volatile scenarios shifts the international focus away from systemic concerns by focusing on the culpability of individuals. This focus springs from the ICC's criminal justice remit and the gravity of the crimes with which it is concerned, whether or not they are relevant to resolving the underlying conflict dynamic. As Nouwen and Werner observe, such a shift in approach has considerable political implications, which are only strengthened by claims of legalism's political neutrality (2010).[8] It follows from this that, implicit in the Court's focus on the crimes of individuals and an overarching remit that curbs other justice approaches, is an assumption that situations of injustice will be addressed through action against individuals; that trials will impact positively upon society, and not just the individual concerned. The Court's early cases provide an opportunity to test this assumption.

Equally, the ways in which institutions confront injustice are likely to affect the ways in which they define it. Measures that culminate in the arrest, trial and conviction of a perpetrator of international crimes may be seen to have brought justice, particularly by those with a professional focus on legal issues. In the same context, from the perspective of campaigners against inequality for example, in relation to access to healthcare or education, and political or economic rights, injustice may still prevail. The Court is of course not mandated to consider these other justice issues, so they fall outside not only its remit but also its notice. The specificity of the Court's criminal justice approach means that its furtherance may obscure broader justice issues, or even be pursued at their expense. While the framework imposed by ICC engagement may affect those working on any aspect of justice, the justice remit possessed by the Court

[8] The focus on individual crimes over systemic issues is a political act in itself. As Anatole France observed in 1894 'The law in its majestic equality forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread' France, A. (1894) *Le lys rouge.* (2015) Paris: CreateSpace Independent Publishing Platform.

is specifically legal. For this reason the ICC should not be seen as delivering justice, but rather applying ICL.

3.1.3d Defining the 'interests of justice'

If the ICC delivers justice only or largely in terms of ICL, then the Prosecutor's responsibility to consider justice more broadly might well place him in a difficult position. The 'interests of justice' are referred to a number of times in the Statute and related documents. As explained in section 2.2.3, according to Article 53, the Prosecutor must determine whether or not an investigation would be 'in the interests of justice'. Should the Prosecutor not wish to proceed with an investigation, the Pre-trial Chamber must also determine whether this withdrawal would be 'in the interests of justice' (ICC 2002; Ocampo 2007b; Schabas 2011: 254-255).

However, the 'interests of justice' have not been defined in the Statute or Rules of Procedure and Evidence. It was initially unclear whether 'justice' in this context meant a broad understanding relating to the 'peace, security and wellbeing of the world' or a narrower legal definition. It may be that the drafters of the Statute assumed the two issues to be intimately associated. It may even be that they also considered the interests of the Court itself to be closely associated with both interpretations. Could a determination that might cause damage to the Court, for example the decision to withdraw an arrest warrant, be in the interests of (international criminal) justice? Clearly in the context of the civil enforcement of just laws there may be a close relationship between justice and the application of criminal law; in volatile environments where pursuit of criminal justice enforcement may itself be violent, and could profoundly affect the course of a conflict or of international approaches to dealing with violence on a regional level, the relationship between legal enforcement and other aspects of justice is more complex. In such a circumstance it becomes important to distinguish whether the Court operates in the interest of justice in a broad or narrow legal sense.

Guided by the Statute, Prosecutors have struggled with this issue. In the Prosecutorial Strategy 2006 the former Prosecutor states 'The Office has the obligation to assess the interests of victims as part of its determination of the interests of justice under Article 53 and Rule 48' (*Rome Statute of the International Criminal Court* 1998; ICC 2002; Ocampo 2006b: 8). At a first reading this is reassuring—victims' interests will be taken into account. Yet the realities of the new contexts for ICL must be considered. For example, if all the children of a community were abducted, the whole community would doubtless consider itself a victim of such a crime. And if such practices were widespread they would constitute an international crime. The Court is intended to address mass crimes such as this. Yet neither the Statute nor the Prosecutors addresses the reality that whole communities may be the victims of international crimes. The same paper states:

> The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security […] a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort. (Ocampo 2006b: 6)

This passage is less reassuring. The interests of victims can clearly not be upheld while matters relating to their security are subordinated to larger concerns. Later, there was an attempt to clarify this issue, however it further emphasised the narrow approach to considerations of justice and victimhood:

> It would be exceptional for a Prosecutor to decide that an investigation is not in the interest of justice, and the victims. The 'interests of justice' must of course not be confused with the interests of peace and security, which falls within the mandate of other institutions, such as the UN Security Council. (Ocampo 2010a: 6)

Security considerations are thus the concern of other institutions, while the Court will prioritise its justice process. How the interests of victims (whether they are individuals or communities) may be prioritised, while their security is not, is an open question. The second Chief Prosecutor revisited the issue:

> The Prosecutor is not required to establish that an investigation serves the interests of justice. Rather, the Office will proceed unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time […]
> the concept of the interests of justice should not be perceived to embrace all issues relating to peace and security. In particular, the interests of justice provision should not be considered a conflict management tool […]
> there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional. (ICC 2013d: 16-17)

This statement is more decisive, and still less reassuring for advocates of human rights of victim communities. The first point rolls back the 'do no harm' agenda, by indicating that international intervention in the form of ICC warrants will be assumed to be a good thing, and placing the onus on others to establish that it is not (Anderson 1999). The second confirms that an intervention might be deemed in the interest of justice, even if it negatively affects conflict management efforts, likely to be associated with the security of a community. Others, such as the UNSC, may consider the security issue, but they are not in any event empowered to interfere with the Court's judicial process to prevent it from intervening (Vinjamuri 2010). The last shows circularity—because of the strong presumption in favour of prosecution, prosecutions will normally proceed. Despite this, it is consistent with previous statements: a narrow interpretation of justice will be used in determining the

Court's actions—one that sets aside considerations of peace and security. This position rests alongside an assumption that this will be in the interest of victims, even though issues of their security are not considered. This is the strategy designed for contexts where mass atrocities have already been committed, which are the Court's focus. Though it is not properly discussed by the Statute or the Prosecutor, there continues to be an apparent perception that international crimes will have only isolated and individual victims. There is, in other words, a strong emphasis on enforcing criminal law based on a presumption that it will be broadly beneficent, regardless of circumstances.

Elsewhere it is claimed that the interests of peace and justice are intimately related, and that the Court serves the interests of peace by prioritising the interests of (international criminal) justice. These goals are not necessarily incompatible, but they do rest upon a central assumption: the Prosecutor need not allow broader considerations of peace and security to impede prosecutorial process, because consideration of peace and security will be advanced through the singular pursuit of international criminal justice. This supposition is now being tested in the violent contexts of ICC engagement (Ocampo 2007b: 8; Roth 2010; Tolbert and Wierda 2010).

If the interests of justice are rather narrowly drawn, so are the identification and interests of the victims. A prosecutorial strategy document identifies the 'interest of victims' as one of its four fundamental principles. This consideration is meant to commence before an investigation is launched, so in this respect it could in theory lead to the ICC staying its hand in particular cases. However, the provision rests only upon Articles 15 and 53 of the Statute (where the interest of victims appear to be congruent with prosecution), as an aspect of the interests of justice. As justice is narrowly defined to exclude the security of communities, and the Statute surprisingly appears to anticipate victims as if they were isolated individuals (as for a municipal court), such consideration seems very unlikely to impede the prosecutorial process (Ocampo 2010b: 6-7). The likelihood that 'victims' of these enormous crimes are not isolated, but are whole communities, is not made explicit nor even identified. This failure of the

Statute, interpreted by prosecutors with a legalist perspective, leaves their security beyond the Court's remit to consider.

3.1.4 The retributivist approach in volatile environments

The essentially retributive approach of criminal justice and its function as a deterrent that marginalises perpetrators has already been outlined. This aspect of the Court's approach remains central when ICL is applied to volatile environments. The routine that prevails in peace time, to issue warrants and bring to trial law breakers, is anticipated to equip this new organisation to deliver justice even in the most challenging situations.

It has already been explained that the application of retributive justice in these contexts has the potential for unintended consequences beyond the legal domain. Some will present themselves for trial voluntarily, as was the case with Abu Garda, who was a suspect during the ICC's investigation of crimes in Darfur and whose case is now closed (ICC 2012). Many other alleged perpetrators may not, and so the retributive justice approach is likely to require enforcement. In the contexts with which this study is concerned, warrants may be implemented by civil police forces, but more often this task is likely to fall to security services or the military. And just as the focus upon the legal domain of justice may yield wider consequences, so too may its enforcement, particularly as the practical implications are outside the Court's remit to consider (and means to control). Warrants may intentionally or inadvertently legitimise military action including the preparation for and execution of military operations. The ICC's 2011 warrant for Colonel Gaddafi played a part in legitimising the NATO intervention in Libya—the humanitarian aftermath of which has been grave and complex (Harding et al. 2011; Fraihat 2016; Reardon 2016). In such circumstances, failure to effect arrest (or death) of a suspect may lead to ongoing military operations. The promotion of international criminal justice by military means may of course be well associated with the aims of states or political forces caught up in such violence; but whether they are or not, the

Court in these circumstances will have entered the dynamic of the war (Vinjamuri 2010; Rodman 2012; Rodman and Booth 2013).

The concern that justice as a whole may be conflated with criminal justice has another aspect. 'Securitisation' is the concept that extraordinary measures are legitimised when an actor moves an issue from the political to the security realm (Duffield 2001). Something similar is risked when the enforcement of international criminal justice is demanded, in contexts in which that process is unavoidably military (ICC 2010a; Roth 2010; Tolbert and Wierda 2010). In 2007 the former Prosecutor was speaking to a significant degree about the LRA and the military process to apprehend its leadership when he said:

> The challenges are immense for political leaders. In this new system, global standards have been established without a global police or enforcement apparatus; enforcement of the Court's decisions is the responsibility of national states […]
> It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace. Allowed to remain at large, the criminals exposed are continuing to threaten the victims, those who took tremendous risks to tell their stories; allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield. Ladies and Gentlemen, the decisions taken in Rome must be respected. Because it is the law. (Ocampo 2007a)

Here ICL is depicted as a security issue, the failure of enforcement of which threatens enduring peace and allows criminals to continue to threaten violence. The matter becomes more important if justice in its wider sense is conflated with the narrow attainment of international criminal justice for one or more alleged perpetrators; as if criminality were identified as the greatest, or indeed the only, source of injustice. The following section identifies an example of this phenomenon.

3.1.5 Peace vs. justice

Ocampo's 2007 paper addressing the relationship of ICL to peace was entitled 'Building a future on Peace and Justice' (ibid). In selecting his title he was of course alluding to compromises used in the past to deliver peace, while granting amnesty to perpetrators (McDonald 2014). Given the foregoing discussion it is clear that aspects of justice may reside on either side of this question; some elements of justice may be delivered through strategies that emphasise peace deals while others will be emphasised through approaches that prioritise ICL. Where societies are attempting the difficult transition from war to peace, measures that focus on one aspect of justice alone may affect other justice-promoting interventions. As neither approach encompasses justice as a whole it would be more accurate then to characterise each by the focus of its emphasis, 'peace vs. criminal justice', or more accurately, 'peace vs. criminal justice for the perpetrators of international crimes for whom ICC warrants have been issued'.

As advocates for the Court will rightly point out, in a regional war the beneficiaries of peace may be disproportionately identifiable in time and place (here and now); the beneficiaries of incremental advancement of international criminal justice through enforcement may be disproportionately remote and in the future. These difficult choices have been discussed by Rodman, who observes the position of Richard Goldstone (former Chief Prosecutor of the ICTR): 'If you have a system of international justice, you've got to follow through on it. If, in some cases, that's going to make peace negotiations difficult, that may be the price that has to be paid.' (McGreal 2007; McGreal 2008; Rodman 2012: 62-64). Some will be troubled by the stark nature of this observation, but it reflects an intellectual honesty concerning the implications of the Statute. The ICC, on the basis of the Rome Statute and its interpretation, clearly prioritises the enforcement of retributive justice to address impunity of certain suspects over considerations of peace and security for communities.

It is fair to observe that peace for amnesty deals may deliver a peace agreement but no peace, or a negative peace in which injustice is sustained as the price of obtaining a cessation in violent conflict (Galtung 1996). Such distinctions are not trivial: insistence upon ending impunity for one perpetrator may prolong a war and risk further atrocities by any party; impunity for international crimes may perpetuate a climate in which atrocities may be committed without regard to consequences and in which the most notorious perpetrators go free, apparently rewarded for their behaviour (Robertson 2006). In a consequentialist frame, each strategy may deliver just or unjust outcomes, and it is incorrect to associate broad justice goals exclusively with either approach.

The calls for justice to be attained through military intervention that have been noted earlier are a clear example of the transfer of the concept of justice into the security domain (Buzan et al. 1998, Duffield 2001). This process is associated with the tolerance of practices that would not normally be acceptable, and such assertions may be tested using case study material.

Finally, ambiguity may be observed at the highest levels with regard to statements concerning peace and justice. As the UN Secretary General stated, 'Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective' (Annan 2004). This statement may be intended to endorse ICC engagement, through noting the mutually reinforcing agendas and thus echoing prosecutorial claims for the advancement of peace through international criminal law enforcement. However, by emphasising the need for integrated approaches, sequencing, and the role of civil society, this account rests uneasily alongside the deontological imperatives set out in the Statute.

In his paper, the former Prosecutor contends that peace and international criminal law reside on the same side of the justice equation, essentially because peace with impunity is no longer permissible by law (Ocampo 2007a). For an international criminal lawyer who perceives justice as achieved through due legal process, 'justice' is not present if impunity is sustained. According to this view, peace attained by granting immunity to perpetrators of mass crimes is not a sustainable just peace or a legitimate means to a worthwhile goal. Thus, by asserting that these elements lie together he is in fact asserting the overarching paradigm of ICL—that where necessary peace should not prevail until international criminal justice is done. In doing so, ICL prosecutors of this disposition are far from alone (AI 2002b; AI 2008; HRW 2009b; HRW 2010a; Benner and Prendergast 2011; Invisible Children 2013).

Others hold the view that justice and peace may broadly lie together, but for the opposite reason. Proponents of justice in its wider sense may view retributive justice for a handful of individuals as only one element of justice; they may see the cessation of military action by both sides as presenting a better opportunity for the advancement of peace. They may view non-military means as more effective or appropriate for the advancement of a just society, whether these be formal or structural societal mechanisms as proposed by liberal interventionists, or national (including legal) or local justice for other societal processes. For those individuals also, justice may reside on the same side as peace (Rodman 2006; Snyder and Vinjamuri 2007; Branch 2010b; Branch 2010c; Vinjamuri 2010; Rodman 2012).

Each side of this debate then makes the same claim—that justice and peace are—or at least can and should be—significantly aligned. However, they differ on what justice is (whether primarily the application of international criminal law, or a much broader concept), to whom it primarily applies (perpetrators and individuals as victims of international crimes, or communities and societies in an affected region), and how it may be achieved (whether through enforcement, or

other means). There are thus considerable problems with the conceptualisation of a peace vs. justice dichotomy.

3.1.6 Issues of legitimacy

The preceding discussion has established that where the ICC intervenes to address international crimes in volatile contexts, the overarching paradigm imposed has significant implications regarding which aspects of justice are prioritised and how they may be sought, and profound ramifications for how these violent contexts may or may not now be approached by the international community. It is possible that international criminal justice efforts may on occasion harmonize with local measures and that they complement one another. They may operate alongside each other without detrimental effect, but this will not always be the case. Given that context has such a bearing on determining outcomes in relation to justice, especially in volatile environments, and understanding both the particularity and uniformity of the international criminal justice approach, there will be instances where local and international measures to promote justice are not the same; where they interfere with each other in negative ways, or even where they are incompatible.

The power of the Chief Prosecutor (and other bodies of the Court) to determine where and when ICC interventions take place is extensive, and has been noted in Chapter 2. Aside from the options for referral by States Parties and the UN Security Council, and the exceptional possibility of UN Security Council deferral of investigation, it is the Prosecutor who directs the focus of the Court. The basis for these decisions is outlined in the Statute, and rests upon the Court's jurisdiction and consideration of the gravity of the crimes, subject to consideration of the 'interests of justice'—an apparently well-crafted ambiguity.

The Court and its officers can claim legitimacy for their actions at a number of levels. Calls for its intervention by communities and their leaders affected by international crimes, and by the victims of atrocities and their families, may lend

local legitimacy. National governments, particularly those with a democratic mandate or other claims to legitimacy themselves, can add to the case for the validity of ICC engagement. States that have themselves ratified the Rome Statute may be seen to contribute their own authority in this regard, and they may further enhance the Court's mandate in a particular context by referring that situation to the Court. However, the foundation for the Court's legitimacy lies in its Statute; the powers conferred by its endorsement by the States Parties, underpinned by the compelling vision of a world where the norms of international criminal justice prevail, and in which perpetrators of mass crimes may not escape punishment, whoever they are. Struett expresses the universality of this legalist ambition as follows:

> The legitimacy of Courts is a function of their claim to uphold universal rules of law that the community has chosen to adopt, regardless of whether doing so is popular or even prudent in a particular case with particular constituencies. (Struett 2012: 83)

By way of clarification, the community reference is not to the affected population but the international community conferring legitimacy upon the Court's actions. The belief that the local community itself should decide its own justice processes has been referred to previously in section 1.4.4, where the complexity and multifaceted nature of these choices was indicated. The normative and overarching aspect of the ICC's interventions, and the focused legal nature of the decision-making, marks a derogation of power and agency from affected communities, to the machinery of international criminal justice. This means that the interests of affected populations will no longer be the central concern of decision-makers (Branch 2004; Branch 2007b; Murithi and Ngari 2011). International criminal justice is a global project driven forward by institutions with a global vision for justice, however much context-specific priorities will on occasion need to be balanced against broader considerations. This has been acknowledged by advocates for the Court who, in relation to the Uganda case, have indicated:

> […] the delivery of local justice may be to the interests of victimized communities, such a grassroots, victim-centred approach must be balanced against broader implications for Africa and the international community. The Acholi people of northern Uganda are clearly not the only constituencies of this situation before the ICC. While every effort should be made to ensure local empowerment and a cessation of war, the effect of impunity in a situation already before the ICC would have far-reaching consequences elsewhere, especially in Africa. Even a superficial observer would recognize that an amnesty precedent for Joseph Kony would have catastrophic consequences for the ICC's credibility in the Darfur situation where leaders such as President Bashir of Sudan are eager to find a pretext to escape liability. Although it may be desirable to take into account the concerns of local communities, the constituency of international criminal justice extends far beyond this local level. (Akhavan 2009: 646)

This and similar observations may have significant ramifications. The legal basis for the Court's legitimacy means that it is in theory released from consequentialist considerations in relation to communities affected by conflict; and indeed, this is implicit in its Statute. The observation that the interests of ICL and the Court may differ from those of war-affected communities in individual situations, and that the Court may then be bound by global rather than situational considerations, follows from its remit. The fact that it is the Court itself to determine these matters, based on how the Prosecutor interprets the interests of justice, means that there is scope for significant unpalatable consequences for communities in volatile regions, as a result of decisions intended to further ICL on the global stage. Richard Goldstone's 'price that has to be paid' may be significant (McGreal 2007; 3.1.5). This issue, in relation to the consequences for affected communities, and the benefits of the furtherance of international criminal justice, can be examined through analysis of ICC interventions going forward. It is important that it is, given the gravity of the implications and the potential severity of the consequences (Krehoff 2011).

3.1.7 Theory of change

Many international interventions designed to achieve specific goals are underpinned by a 'theory of change', that outlines the envisaged network of causal linkages between an intervention or sequence of interventions in a given context, their outcomes, and the intended eventual impact. As has been argued:

> Improving the lives of disadvantaged populations - whether through better schools, after-school programs, or teen pregnancy prevention clinics - requires proven theories of change. The very development of a field depends on their diffusion, replication, critique, and modification. Yet some organizations refuse to articulate a theory of change and some funders think it would be intrusive to demand that they do so. The interests of all concerned are served by a developmental approach to creating and evaluating theories of change. (Brest 2010)

Even if primarily seeking to apply deontological measures outside a consequentialist framework, it is important that interveners are able to identify the anticipated relationships between actions and their intended impact.

Section 1.3.3 has already identified that the literature on how regions or states move towards stability and good governance does not identify external (and if necessary, militarised) enforcement of international criminal justice as the primary mode of engagement appropriate to volatile contexts. Nor does it suggest that international intervention should be spearheaded by retributive justice priorities. Rather, as has been shown, it suggests that processes that govern the transition from violence to just and stable societies are complex, sequenced, and multifaceted (Colletta et al. 1996; Paris 1997; Paris and Sisk 2009; Putzel 2010).

Advocates for the ICC are clear about the Court's purpose: it is investigation, issuance of warrants, arrest, trial and imprisonment of those responsible for international crimes. They are also confident that the Court's impact will be the extension of the rule of international criminal law, with concomitant consequences relating to human rights and wellbeing. These beliefs were articulated in a similar form to the ICRC by Moynier in 1872, and Dunant before him (2.2.1). Mechanisms through which these outcomes can be achieved are now established (2.4). What has not been made clear, and would be required from a coherent theory of change, is how these mechanisms would deliver the desired change *in the volatile environments in which the Court is expected to act*.

An examination of the Court's strategy documents, made available on its web site, does not answer this question. However, those pertaining to the Uganda warrants do articulate organisational goals relating to the efficient functioning of the Court as an institution. They identify that the environments for operation are different to those of courts in the past, and that this presents particular risks relating to witness testimonies. They show targets for implementation relative to the Court's processes, such as numbers of investigations, arrests, convictions and so on. The former Prosecutor also indicated that he would focus investigations upon those who bear the greatest responsibility for the most serious crimes (Ocampo 2003; Assembly of States Parties to the Rome Statute - ASP 2006; Ocampo 2006b; Ocampo 2007b; Ocampo 2010b). In relation to the situations of its interventions, the Court's goals concern its own legal processes, but do not correspond to an articulated theory of change.

3.2 Practical challenges

The preceding section outlined potential issues for the Court stemming from its Statute and its application. The Prosecutor's task is no less challenging when considered with respect to the situations in which the OTP is expected to

intervene. Notwithstanding the normative progress it represents, even at Nuremberg the principles of a fair trial were applied to some extent selectively as noted earlier, in accordance with the interests of the victorious parties. Where appropriate the ICC, by contrast, is anticipated to intervene in active conflicts, and in a manner that is perceived to be impartial and in accordance with its criminal justice mandate. This throws up potentially difficult issues that merit careful discussion. The following section outlines practical challenges to the work of the Court arising from the circumstances of its interventions, its operations and enforcement.

3.2.1 Opportunities for intervention

The ICC's jurisdictional limits mean that its opportunities for intervention are necessarily restricted. The nature of the crimes included in its Statute suggest that they will often be perpetrated in the most unstable regions, where processes of law enforcement and governance generally are weakest. Furthermore, the required focus on interventions in signatory states unwilling or unable to bring perpetrators to justice may necessitate a very clear understanding of, and ability to work within, the practical constraints. Already then the Prosecutor's options for intervention are limited. In reality though, and in relation to its interventions on the ground alone, the Court also operates under further and often un-stated constraints. It must choose to act where there is a reasonable prospect of successful investigation, arrest, trial and conviction. Numerous unexecuted arrest warrants with little prospect of successful enactment could undermine the Court's credibility. In reality these challenging environments may demand that the Court secures military collaboration from states willing and able to assist. Additionally, in selecting its interventions the ICC must not alienate others, and must sustain a political environment for itself that will enable it to continue to secure political, military and financial support. This is a severe challenge when considered alongside the requirement placed upon it to conduct itself in a neutral fashion and through its legal function enhance its own legitimacy, apparently un-influenced by political considerations

(Struett 2012). The Prosecutor is therefore likely to face significant practical and political challenges defending his selection of interventions and the identity of warrant recipients on legal grounds alone. All arrest warrants so far have been issued against Africans and in relation to African conflicts. Situations such as Afghanistan, Iraq/UK, Israel/Palestine and Georgia are under examination or investigation, but none have yet led to Court intervention (ICC 2016).

3.2.2 Complications relating to military enforcement

Other significant complications attend the enforcement of arrest warrants. As previously noted, the ICC itself has no police force. The Rome Statute anticipates that in some circumstances suspects may present themselves for trial, as in the case of Abu Garda (ICC 2012), or be arrested by civil police in accordance with due legal process as in the case of Jean-Pierre Bemba, former DRC vice-president, who was arrested by the Belgian authorities (ICC 2014). Of course the Court's mandate extends beyond democratic states, and includes territories where security services may not be properly regulated and accountable. Thomas Lubanga was apprehended in Kinshasa, for example, where the security services have a questionable human rights record (ICC 2015c). Nevertheless, in relation to the enormity of the crimes that ICC suspects stand accused of, and notwithstanding the presumption of innocence, it seems likely that in most circumstances the achievement of civil arrest would often be overwhelmingly beneficial both in relation to the individual case and the broader context of human rights observance and accountability.

In other cases, the situation presents greater challenges. It has already been observed that as a permanent Court the ICC will issue arrest warrants into active conflicts and regions, where civil police are unable to operate, and where atrocities may well be taking place, often by various parties, above and below the ICC's 'gravity' threshold. In such cases, arrest by military means may be the only option. In these circumstances the ICC lacks control over how others

act upon its warrants, and the legitimacy lent to aspiring enforcers may have unintended consequences.

Reflecting Articles 86 to 93 of the Statute, and as stated on the ICC's web site, 'States Parties to the Rome Statute have a legal obligation to cooperate fully with the ICC. When a State Party fails to comply with a request to cooperate, the Court may refer the matter for further action to the Assembly of States Parties' (Article 87). There is no provision for the Prosecutor to decline the assistance of states with records of abuse. It may be that warrants could help to curb their worst infringements, but this is speculation and the lawful behaviour of enforcers cannot be assumed.

As it stands, signatories that have ratified the Statute include states whose military and security services have a deplorable reputation for human rights abuses. In the case of Colombia for example, where the government of Juan Manual Santos is apparently committed to promoting human rights and ending impunity, the security services continue to be implicated in international crimes (AI 2012). According to Human Rights Watch, the Philippines security services are responsible for politically motivated extra-judicial killings yet the Philippines too is a State Party. Now that they are signatories, only their failure to ratify the Statute relieves the security services of Sudan, Russia, Uzbekistan, and Syria from joining with the Court to promote enforcement (HRW 2011a).

In Africa, the continent of all the warrants of the ICC's first decade, states engaged in the enforcement of warrants are operating security services that perpetrate grave human rights abuses. The Central African Republic (CAR) has been riven by conflict for many years, and while armed groups probably constitute the primary perpetrators on its territory, the CAR security forces are known to commit atrocities with impunity (AI 2011a). The DRC is another state whose security services have committed multiple human rights abuses amidst internal conflict and civil wars (AI 2011b). The Prosecutor completed an agreement with the Sudanese Government to co-operate in implementing its Uganda case warrants in October 2005, eight months before opening its

investigation into Sudanese atrocities in Darfur which culminated in the issuance of the warrant for the Sudanese President Al Bashir for genocide three years later (Ocampo 2006c: 31; ICC 2015b). Even the Ugandan state (and particularly elements of its armed forces) was found guilty by the ICJ of violating international humanitarian and human rights law in DRC, including killings, inciting ethnic conflict, training child soldiers and torture (ICJ 2005b). Yet each of these states is involved in seeking to enforce ICC warrants as an aspect of their broader military operations. It is notable that even one non-ratifier, the US which 'unsigned' the Rome Statute in 2002 thus distancing itself from the Court's international criminal justice standards and commitments, is by contrast significantly involved in the Court's international military enforcement (Branch 2010b; Branch 2011). The securitisation of international criminal justice is of more than theoretical concern.

ICC warrants thus have the potential to affect the dynamics of active conflicts, becoming military objectives in their own right, or elements in the propaganda campaigns that accompany or seek to justify wars. There is a possibility that ICC warrants could be used to legitimise military activities including violence in zones already experiencing atrocities at the hands of rebel or government forces, as they seek to apprehend their foes by military means and secure the publicity coup of an international trial. This prospect has prompted some to observe that international criminal justice has become caught up in a paradigm of 'conflict authorisation' (Findlay and Henham 2010). Stakes may be raised for military commanders on all sides of a conflict, as they seek to become ICC enforcers and/or to evade trial. The ICC has little control over this process after an warrant has been issued, and thus consideration of the human rights implications of warrants must take place prior to their issuance. Even accepting Struett's view that the Court must engage in consideration of these elements covertly, it is far from clear how this can be done (Struett 2012). Issues of diplomatic and military context are wide-ranging and hugely complex, and fall well outside the Court's expertise in legal matters. It is not even clear that the Court's structures have the capacity to properly assess the ramifications of its own interventions. The former Prosecutor's view that issues of security and

peace fall within the remit of the UNSC or other bodies may in fact reflect a realistic assessment of the Court's abilities. As has been indicated, the Court's independence, rooted in its legal mandate, would in any case only allow it to be influenced by issues of peace and security in highly exceptional circumstances.

In conclusion, the implications of issuing an ICC warrant into uncertain and dangerous environments extend beyond the case itself, and enforcement efforts will have the potential to become significant elements of military and political campaigns or strategies. The relationship between military activities and ICC enforcement in conflict zones thus has the potential to generate unintended consequences with significant human rights implications. The Court is not mandated to consider such issues, and those organisations or individuals that are, have little influence over its legal process. If there is private consideration of these issues by the Prosecutor it must remain confidential to preserve the pretence of political independence, and thus beyond public scrutiny. Theoretical concerns have already been raised in relation to the Court's objective to further the global norms of international justice, potentially at the expense of the interests of the human rights of affected communities. Early warrants provide the opportunity to assess these anticipated complications of ICC military enforcement in practice.

3.2.3 Complications relating to the protection of witnesses

A second challenge in relation to the issuance of arrest warrants into active conflicts relates to the protection of victims, witnesses and their communities. This issue is anticipated in the Rome Statute (Article 68, and 57.3). Specifically, the Rome Statute states the following:

> The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. (Article 68.1)

> Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. (Article 68.5)

Related regulations charge the Prosecutor with responsibilities in relation to assessing risk to witnesses and others, and concern themselves with issues such as safety, well-being, psychological and psycho-social issues, and avoiding the possibility of re-traumatisation. Measures anticipated to mitigate risk include possible alternatives to questioning, data protection safeguards, and additional security measures in consultation with the VWU (which itself has no capacity for ensuring community security as such). It is important to consider whether these assessments and measures are likely to be commensurate with the task, given the scale and severity of the national and/or regional security issues involved (ICC 2009b: regulations 36, 45-47).

The militarised and potentially violent contexts in which protection will need to take place may also be tight-knit communities where visits and conversations with Court officials or outsiders, or periods of travel or absence to facilitate contact with Court officials, can be rare and conspicuous. Communities from which witnesses have travelled may be well aware of individuals' movements and engagement with the Court, and even if their evidence is made anonymous, the location of the crimes in question or the incident involved cannot easily remain secret. Through no fault of the Court, it may not be easy or in some cases possible to sustain the anonymity of witnesses.

The Statute has provision for the protection of victims, witnesses and their families (Articles 68, 87). These measures address (at least in theory) the relatively unlikely though still extremely serious possibilities of violence against targeted individuals. This attention to relatively small-scale risks that would be appropriate in less dangerous contexts is reflected in prosecutorial reporting, in

relation to work in the DRC for example (Ocampo 2006c: 11-12). However, in these new contexts groups whose leadership have had ICC warrants issued for them may be quite indiscriminate in meting out vengeance, in retaliation for evidence offered or simply opinions expressed.[9] Armed forces seeking to teach witnesses a lesson or deter others need not identify the individuals or their families for reprisals, as the Statute and regulations seem to imply. Atrocities inflicted on a witness's community may be just as effective, particularly if committed on a large scale. The engagement of victims and witnesses with the Court even at the investigations stage, or their testimony in relation to an incident or specific geographic location, may place communities already vulnerable to attack from rebel forces or states militaries or security services at significant risk. The protection of communities put at risk in such situations could have been addressed in the Court's procedure documentations concerning the long and short-term plans for the protection of those put at risk. However, neither here nor in the Statute does the scale of this issue appear to be anticipated (ICC 2002: Rule 17). Again, through no fault of the Court or its officers, the safety of witnesses or those in line for reprisals in these violent contexts will sometimes be well beyond its power to assure. This lack of Statutory anticipation of the circumstances of international crimes is an extension of the issue raised in 3.1.3d concerning the narrow identification of victims of crime as individuals, rather than communities.

The Prosecutor and other Court officials are aware of such challenges, as Schabas observes, but as previously discussed security concerns have been set aside as falling within the remit of other agencies (Ocampo 2003; Schabas 2011: 358-360; Rodman 2012). An example occurred in 2005, in relation to the

[9] This is not a hypothetical example. The LRA has in the past heard broadcast of a community in northern Uganda celebrating a setback it had suffered. In response it returned and committed an atrocity at that location upon the whole community, irrespective of which individuals were celebrating (author's notes). If rebel groups commit collective punishment in this way, in an environment where there is no prospect for military protection (as has been the case throughout the LRA's area of operations) then what means can the Court realistically provide to protect whole communities that are put at risk by the statements of witnesses, whose provenance can be identified on the ground through community networks, ICC activity, or by the evidence they submit? (Allen 2006b).

Darfur warrants, when Professor Antonio Cassese indicated that the continuing insecurity of potential witnesses prevented effective and safe investigations.[10] The Prosecutor stated 'at the heart of Professor Cassese's observations is the belief that the [Office of the Prosecutor] and the Chamber have a responsibility to enhance security for victims of crimes in Darfur'. The Prosecutor was forthright in his position, stating that the intervention of the Court 'should have the consequence of contributing to the protection of the civilian population in Darfur, by preventing further crimes' but that it was not mandated to do so (ICC 2006a). Notwithstanding Rule 17 of the Court's Rules of Procedure and Evidence (ICC 2002), which (astonishingly unrealistically) charges the Victims and Witnesses Unit with providing 'adequate protective and security measures', his view was that the responsibility for security lay with others. In the case of the Darfur arrest warrants, this would have included the Government of Sudan (led by Omar Hassan Ahmad Al Bashir who was subsequently wanted by the ICC for Darfur crimes himself), the UNSC, African Union and other relevant international organisations, even though their respective willingness or capability to assure protection was highly questionable. This Prosecutorial view is consistent with the position identified in the previous section, that security concerns fall outside the remit of the Court.

Subsequently, the former Prosecutor likened such threats to blackmail, indicating that moral and practical considerations should be set aside in favour of the legal necessity to pursue arrest and prosecution (Ocampo 2007a: 9). The Statute makes provision for protection in theory for individual victims, witnesses and their families, but not in practice. As already established, the larger issue of the protection of victim communities is considered outside the Court's remit even at a theoretical level.

Finally, in relation to both the issue of military enforcement of arrest warrants and protection of witnesses, and perhaps with Nuremberg in mind, the situations apparently anticipated by the drafters of the Statute seem to assume

[10] Professor Cassese was then Chair of the UN Commission of Enquiry and one of the two advisors requested by the Court to advise on the protection of victims.

that military force will in any case prevail and be aligned with the Court's purposes. In a situation where the 'wrong' side wins a war or retains or gains control of territory, or is able to operate in a region where witness communities cannot be protected—and indeed in many of the situations into which the ICC is expected to issue warrants—the aspiration of the Court to effect arrest or protect witnesses and their communities may not be realistic or realised. This does not imply that ICC warrants will not have effects in such circumstances. Indeed, the binding paradigm applied to international interventions conveyed warrants will apply indefinitely. After issuance of arrest warrants their application, and the prioritisation of international criminal law (ICL), become a permanent fixture of an ongoing conflict indefinitely curbing other options to for security or peace.

3.2.4 Complications relating to peace processes

If these first two challenges relate to the complications of military enforcement of ICC warrants, the third relates to their effect on efforts to bring conflicts to a close. Given the Court's legal purpose in bringing to an end to impunity particularly for those most responsible for the gravest atrocities, and the expectation that it would intervene in volatile regions, it was inevitable that ICC warrants would soon become relevant to peace negotiations. Efforts to prevent or end wars by negotiation, should they involve the offer of amnesty or the possibility of impunity for perpetrators, would challenge the ICC's purpose. The leaders of military groups bearing the greatest responsibility for international crimes could in some cases both be targeted by the ICC, and be crucial to peace negotiations. With such individuals being unlikely to negotiate themselves into a trial, peace treaties might in future need to accommodate themselves to the new reality. Under the influence of the ICC, peace with impunity for suspects is no longer an option. This clear position is reflected on the ICC web site, where it is stated:

> Can peace and justice work together? International justice, national justice, the search for the truth, and peace negotiations are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution. It is essential to ensure that any conflict resolution initiative be compatible with the Rome Statute, so that peace and justice work effectively together. (ICC 2015a)

It is required by the Court that in practice, as well as in theory, negotiated peace should be attained only when compatible with the ICC's prosecutorial process.

This is not just a theoretical concern. The Court's stand is already influencing the guidelines on what UN sponsored peace negotiators or State signatories may offer. They may not give amnesties to perpetrators of crimes within the remit of the Court. The UN has provided clear guidelines in this respect, and the expectation is that negotiations are accommodated to the requirements of the Rome Statute (Hayner 2009; UN Secretary-General 2010: 7-8,10; *UN guidance for effective mediation* 2012: 16).

The rationale supporting a strong stand by the Court and its high standards of criminal justice understandably relate to the vision of the Court and its supporters for a new climate of international justice, and its efforts to usher in this 'era of enforcement' as a means to promote human rights for all. In relation to this vision, a complementary claim has been that peace attained at the price of impunity is likely to be short-lived in any case (Ocampo 2007a). While this is not universally accepted, and counter evidence can be found (the examples of the Northern Ireland Good Friday Agreement and the South African Truth and Reconciliation Commission have been referred to), proponents of this view point to examples of failed treaties that offered impunity. These include the unsuccessful 1994 Lusaka Protocol that sought to put an end to the Angolan civil war, and the 1999 Lome Accord of the Sierra Leone conflict, which awarded Savimbi and Sankoh respectively impunity for their crimes (*Lome Accord* 1999; Prendergast 1999). Events surrounding Charles Taylor's detention in Nigeria in 2006 and subsequent trial have been controversial.

While his culpability for war crimes is not generally contested, the possibility of a Court process for Liberia was prevented though political pressure—a measure that some believe averted the risk of triggering considerable instability and further violence (Ainley et al. 2016).

The ICC recognises that the requirement for treaties to deliver perpetrators (who are potentially the leaders of their delegations) to trial has raised issues for some, and indeed a session at its 2010 review conference was devoted to a discussion about peace and justice issues. James LeMoyne (mediator and former special advisor for Colombia to the UN Secretary-General) and Barney Afako (legal advisor to the chief mediator on the Ugandan peace process negotiations) presented the dilemmas or challenges they perceived in reconciling peace with criminal justice (ICC 2010a). But it is the Prosecutor's position, as the individual empowered to take such issues into consideration, that determines the Court's readiness to respond to this issue. The Rome Statute places the Prosecutor at the heart of these deliberations.

In guiding the Court through its engagement with peace negotiations there are four options. The Prosecutor may determine that it would not be in the interests of justice to proceed with an existing case under Article 53. However, it is now evident that this option is restricted in application to the furtherance of a narrow view of justice and would be highly exceptional. One may expect it to be applied only very rarely, and then upon a legal basis alone. A second option of limited relevance to securing lasting peace deals is a request by the UN Security Council, under Article 16, that a case be deferred for 12 months. It seems unlikely that such a temporary measure would satisfy those named in arrest warrants seeking to avoid trial indefinitely, sufficiently to facilitate a peace settlement. The principal choice facing the Prosecutor is therefore between the third and fourth options: to defer arrest warrants (potentially indefinitely) until an opportunity to arrest with reduced human rights consequences arises, perhaps in line with Struett's view of necessary but discrete political accommodation (2012); or to allow negotiations to take their course within the ICL paradigm, achieving arrest if possible or allowing a return to war if necessary.

Faced with the practical assessment of the value of an intervention, the asymmetries relating to consideration of this issue (previously indicated in 2.3.2 and 3.1.3) come to the fore. They mean that in practice the Prosecutor must act as both an advocate for prosecution, and as an independent assessor of the value of prosecutorial efforts in relation to other interests. Additionally, as previously discussed, the Prosecutor may be compelled to proceed with a prosecution by the Pre-Trial Chamber (PTC), but there is no mechanism to compel him/her to stop. With such grave possible consequences the Prosecutor's is perhaps an unenviable position.

The new situation created by the issuance of warrants into active conflicts creates another situation in practice that has received insufficient attention. Prior to issuance of an arrest warrant by the ICC, a perpetrator may be deterred from committing further atrocities by this possibility. However, following their issuance suspects lose the incentive not to commit atrocities as they will face trial if apprehended in any event. Additionally, they lose the incentive to engage in (UN sponsored) peace negotiations, which can no longer offer them amnesty. Issuance of a warrant may thus remove the deterrent effect upon their actions while precluding a negotiated peace. The human rights implications of ICC warrants in active conflicts are thus uncertain, and analysis of the ICC's impact in such situations will be needed to determine its consequences. The warrants issued against Omar al-Bashir (President of Sudan), Laurent Gbagbo (former president of Ivory Coast, now on trial), and Muammar Gaddafi (Libyan President, now deceased) are cases in point, and these issues will be discussed in later sections.

The preceding discussion indicates that, in relation to practical issues such as military enforcement of ICC arrest warrants, protection of those affected by its engagement in conflict areas, and impact on peace negotiations, ICC interventions have significant potential to trigger unintended consequences in relation to justice and human rights issues. Additionally, it can be seen that expectations placed upon the Prosecutor in particular, to make judgements

between the interests of his or her prosecutorial process and the interest of communities that may be affected by unpredictable but potentially grave impacts, are considerable. The intertwining of criminal justice aspirations with military enforcement processes, as heralded by the Rome Statute, and the expectation of intervention in active conflicts, lead the ICC and communities affected by atrocities into new situations, with consequences that are difficult to predict.

3.3 Conclusions

Considering the purpose of the Court as envisaged by Moynier and Dunant (Dunant 1862), it is appropriate to assess to what extent their intention to regulate the ways in which wars are fought and to limit the suffering that they cause will be brought about by the ICC's activities. They anticipated a process of criminal investigation, issuance of warrants, arrest, trial, prosecution and punishment of the most notorious perpetrators, and this vision is shared by the Court today. The ICC also perceives this chain of events to be instrumental for the achievement of stability, security, peace and justice. By the iteration of this process it is hoped a new climate of adherence to the law may be created and disseminated through international and national legal systems, establishing Robertson's 'era of enforcement' (Robertson 2006). Human rights campaigners from around the world are drawn to this vision.

It is possible to distil from the preceding discussion assumptions that underpin the belief that by pursuing its focused criminal justice purpose the ICC is likely to achieve the Court's broader goals for humanity. While they are intimately interlinked, these beliefs embedded within the Court's Statute or fundamental to is function fall under four broad headings: the primacy of the Court; its interpretation of justice; the requirements of enforcement; and its theory of change.

This thesis is concerned particularly with volatile environments, in which ICC warrants may become part of a conflict dynamic, or where the intervention of the Court is likely to be associated with violence of suspects or enforcers. These are circumstances in which the consequences of success or failure are heightened. By articulating the suppositions embedded in the Rome Statute, or made by the Court or the Prosecutor, it has been possible to examine their appropriateness in early cases addressed by the Court. The following section summarises these key findings, and are the first product of this research.

3.3.1 Assumptions underpinning the use of international prosecutorial justice mechanisms in volatile environments

3.3.1a Primacy

The frame brought by the Court is universalist, to be applied in all circumstances of its warrants, subject to the Statute, and the Prosecutor's discretion. The Statute and its related documentation binds signatory states and international agencies to its process. Addressing the crimes of individuals is now the first priority in the volatile contexts of Court warrants; there, henceforth, the application of unwavering and universally applied criminal justice processes for the most prominent offenders is an overarching justice paradigm. Other approaches to justice or means to achieving it must conform to its standards. This primacy of international criminal law and its methods, as projected by the Court, extends not only over signatory states and international agencies, but also over the will of populations affected by crimes who may be caught up in the ensuing process to achieve arrest. Communities affected by atrocities may not impede the Court; and this arrangement is deemed to be universally effective and appropriate.

There is the possibility of the Court's process being curtailed 'in the interests of justice'. This seems to provide the opportunity to address instances where communities affected by atrocities, their human rights and understandings of justice, are not aligned with the interests or actions of the Court. However,

according to the Statute, it is the Prosecutor who is empowered to arbitrate between the interests of ICL and the community. The Prosecutor's own interests are inevitably closely bound to those of the Court and legal process. There lies here a profound assumption that the interests of the Court and communities (including their human rights and any other notions of justice or self-determination they may have), are aligned, and that Prosecutorial discernment alone is sufficient to manage any conflicting priorities.

Most fundamentally, there is an assumption that the unwavering application of ILC through the Statute will better advance ICL itself than a more nuanced approach, aligned with other interventions and broader community justice and human rights interests.

3.3.1b Justice

The Statute brings with it clear interpretations of justice. Previously consequentialist considerations have dominated international engagements in volatile situations. These have often been informed by context, and assessed according to impact. The adoption of the Rome Statute marks a decisive shift by the international community away from consequentialism, towards a deontological approach (with much more long-term consequentialist goals). International interventions in volatile contexts where the ICC intervenes will be subject to the enforcement of the rules of international criminal law. The new paradigm in place is deontological, focused upon the dispassionate application of legal codes.

The Statute also determines that justice approaches will be predominantly retributive. The Court's process subordinates restorative justice methods. However, volatile environments where the historical roots of violence are complex, and victims and perpetrators hard to differentiate, may still deploy restorative mechanisms. Truth and reconciliation commissions and traditional justice approaches may operate only when they do not impede the new retributive process of the Court.

3.3.1c Enforcement

Retribution requires enforcement, and there is an assumption in favour of the enforcement of ICL. In the volatile contexts of many ICC interventions, where crimes are most heinous, civil arrest will often not be possible and military enforcement will be required. The contexts of warrants will include wars and regions where instability and conflict is widespread. Although violence will clearly often be necessary to apprehend suspects, the Court's relationship to the violence of its own enforcement is undefined. There may be an assumption that enforcement, even if violent, will be swift and localised, but some enforcement actions could be prolonged and/or widespread. The Court has little or no control over who will carry this out, and how.

During this process there is no clarity about how communities (including but not restricted to victims and witnesses) will be protected, whether from perpetrators in response to warrants, or from the violence of the Court's own enforcement. Communities affected by ICC intervention may be situated within wars where territories are exchanged, and new risks to victims or witnesses emerge. Additionally, there appears to be an assumption that ICL enforcement will be aligned with superior military power. However, ICC warrants may be issued against both sides or multiple parties, or into contexts where suspects for whom warrants have been issued become the victors. In such circumstances witnesses may become targets. The Court is not equipped with extensive powers of conflict and context analysis, and its deontological frame implies that it should be led by the gravity and nature of crimes committed rather than consequentialist considerations. Thus, in any event, there is an assumption that the outcome of violence associated with warrants, whether by enforcer or perpetrator, will be proportionate and acceptable.

The Statute is intended to prohibit impunity, and peace deals mediated by the international community may no longer offer amnesty to the targets of ICC warrants. Where peace is are not achievable without such amnesties (i.e. where suspects are not prepared to offer themselves for trial), there is an assumption that a continuation of war is preferable to their sanctioned impunity.

Decisions to defer or otherwise impede implementation of ICC warrants for moral or practical reasons are not acceptable (ICC 2010b; Ocampo 2010a). Issues of peace and broader notions of justice fall outside the Court's brief and into the remit of other organisations, to which the Court is not accountable.

3.3.1d Theory of change

Associated with the emphasis on criminal law as the primary frame with which to advance a justice agenda in volatile environments, is the notion that by confronting the crimes of a few individuals, a broader situation will be addressed. The theory of change in unstable environments implicit in ICC interventions is not usually explicitly laid out by its advocates; however, it places the application of criminal prosecutions for international crimes as central. Whatever else may be taking place in these violent and diverse contexts, criminal arrest and the ending of impunity for suspects, advanced by military means if necessary, is assumed to be significant in furthering the development of good governance and the rule of law. In consequence, where conflicts are sustained in order to seek an end to impunity, other initiatives with other priorities, whether for justice, improved governance or humanitarian goals, may be postponed, or limited by the Court's often violent enforcement process.

3.3.2 From theory to practice

This research has so far identified a number of respects in which international criminal justice in general, and the ICC in particular, carry specific but often un-stated answers to questions concerning the nature and definition of justice, and how it should be promoted. The perspective of the Court and the drafters of the Rome Statute will be critiqued in the light of the case study. The following chapters will present learning from the LRA warrants and thus assess the extent to which the Court's first cases have borne out or challenged these assumptions, and the degree to which lessons from this early experience have been articulated and allowed to inform the future functioning of the Court.

Appraisal complete, we can proceed from theoretical considerations to practice and evidence.

From the perspective of the newly established Court in 2002, there was a need to identify situations in which crimes of sufficient gravity had apparently been committed. There would need to be some prospect of identifying individual perpetrators for ICC warrants, and of gathering evidence for trial in the context on the ground. Just as importantly, a credible means of apprehending the suspects would need to exist; enforcement by state(s) of sufficient power and legitimacy to be respectable promoters of international criminal justice would be necessary.

The LRA commanders initially appeared to present an ideal first case. The opportunity to address a situation of growing international concern—an intractable conflict in which the Court might precipitate a positive shift in the dynamics. If the new norms of ICL could be projected into a region previously seen as beyond its reach, or into a live conflict hitherto beyond the remit of *ad hoc* tribunals, so much the better. Unofficially the Prosecutor may also have considered issues such as the strength of the armed group concerned, and its cause, agenda and local or international support. A weak or isolated force with few, unreliable, or disreputable international benefactors or friends to complicate the ICC's engagement politically, or its enforcement militarily, would be advantageous.

Further characteristics might enhance the Court's apparent legitimacy, should the intervention be successful. A move that responded to calls from human rights advocates internationally for justice, and to requests from communities affected by atrocities for international intervention, would strengthen its mandate and could enhance its reputation. State referral would add further legitimacy to an intervention, and potentially enhance the process of enforcement. The alignment of ICL with state and community priorities might be particularly important in the early cases.

Remarkably, to a greater or lesser extent, all these conditions could be seen to have been met in the case of the Lords' Resistance Army atrocities in northern Uganda, commanded by Joseph Kony. The LRA leadership were subjects of the ICC's first warrants. At the time, in many ways this case was seen to be an ideal intervention by the Court. Conditions for its first entry into troubled waters must have seemed auspicious.

A decade and more on from these events, some conclusions relating to issues of justice have already been offered, and widely accepted. The alignment of peace and criminal justice priorities have been identified and assessed; notwithstanding some controversy, the impact of criminal justice measures on peace processes in the light of this case has been claimed to be positive. The Uganda case, while initially seeming troublesome, has latterly been identified as exemplary in various quarters (Seibel and Holzinger 2008; Akhavan 2009; Hayner 2009; HRW 2010a; ICTJ 2010; Roth 2010; Tolbert and Wierda 2010). However, the evidence base of early findings merit careful examination. The next Section critically analyses the single situation of the LRA warrants. This case study has the potential to yield conclusions at all levels.

Section 2 Case study

Chapter 4 Background to the LRA war

4.0 Introduction

Section 1 has offered observations concerning the nature of the ICC and the mandated and implied characteristics of its interventions. These arise directly from its Statute, interpretation of justice issues, and intended mode of operation. Section 2 concerns the case study, and provides an evidence-based overview of the first intervention. Chapter 4 examines the roots of the conflict in Uganda, and its dynamics in the 1990s and early 2000s. This leads on in Chapter 5 to an account of how the ICC intervention from 2004 to 2010 has been interpreted, particularly by its supporters in the legal, governmental and military establishments, and the international human rights community. These two chapters prepare the ground for the application of evidence from the affected communities in Chapter 6, which allows the established understanding of events to be tested and re-assessed. Appendix 1 gives a chronology of some of the events referred to in the text.

Any articulation of events during a contemporary military conflict is likely to be contested; however, by relying on evidence from communities directly affected by the violence, and those working with them or researching their experience on the ground at the time, an account rooted in community experience from multiple and widespread sources is developed. The evidence-base for this thesis has been indicated in the Introduction, and the references supplied in the text point to specific studies, reports, and accounts from lived experience of the author and others that substantiate the points as they arise.

4.0.1 Narratives of the conflict

A ‘dominant narrative’ of the LRA conflict exists, and has shaped external interventions over three decades. Branch eloquently encapsulates its main thrust:

> [The official discourse proposes…] the meaningless, criminal brutality of the LRA, the innocent child-victim, and the Western saviour—the image that has informed the numerous interventions in northern Uganda. But this image, or minor variations on it, is not unique to the way violence in Uganda is represented in the West. In fact, Africa itself tends to be seen as one large terrain of afflicted humanity, as a continent of mere humans without history, agency, or meaningful political or social life. Their suffering is the suffering of the human, and thus coded as human rights violations, crimes against humanity, or humanitarian crisis. (Branch 2011: 5)

Branch further argues that Westerners (or perhaps interveners influenced by the Western model), having empathised with and abstracted Africans’ pain as their own, and failing to perceive African and political and social agency, then feel entitled (even obliged) to act as ‘redeemers’. This narrative has proved immensely popular, powerful and resilient in the case of northern Uganda.

Adapted for the Ugandan context, this view holds the Ugandan government as an exemplar of the ‘African renaissance’ and an agent of the West’s redeeming mission (Museveni 1997; Mbeki 2000). Its actions have been understood as aligned with the interests of the (supposedly helpless) civilian population, and its military efforts to restore the rule of law have been seen in sharp contrast to the LRA’s senseless campaign of terror and atrocities. They have tended to portray events as a simple binary clash between two protagonists, often perceived as good and evil; the latter being either mysterious, inexplicable or ‘magic’. Some even seek a resolution through awarding perpetrators ‘celebrity’ status. Insofar as this shallow and bipolar view has informed international interpretation of

events it has been dangerously misleading (Woodward 1991; Drogin 1996; Rice 2007; Green 2012; Invisible Children 2013).

While the LRA's deplorable conduct is not in doubt, the dynamics on the ground have long demonstrated these perceptions as false (AI 1989; AI 1991; AI 1997; Gersony 1997; AI 1999; HRW 2002a). However, from the turn of the century this dominant narrative was increasingly identified and systematically discredited. Through thoroughgoing research Finnström, Dolan and Branch have presented a rigorous critique of the LRA war, and articulated a sophisticated understanding of its dynamics from the communities caught up in it, consistent with the data (Dolan 2000b; Dolan 2002; Branch 2004; Branch 2005; Finnström 2006a; Finnström 2006b; Finnström 2008; Branch 2009; Finnström 2010).

More generally, from the late 1990s the LRA war was often described as a forgotten conflict; 'the world's worst and most forgotten humanitarian crisis' as the UN under-secretary for humanitarian affairs Jan Egeland described it in 2003 (Rodriguez Soto 2009: 198). However, just preceding and then during the first decade of this century it gained international prominence partly as a result of his work, and the efforts of local and international bodies and intergovernmental agencies. NGOs such as Human Rights Watch (HRW) and Amnesty International (AI) produced reports highlighting the suffering of civilians, while local organisations called for greater international engagement (AI 1997; HRW Africa and HRW Children's Rights Project 1997; AI 1999; ARLPI and JPC 2001; HRW 2002a; HURIFO 2002; ARLPI et al. 2003; ARLPI and Justice Resources 2003; HRW 2003a). These calls were amplified through UN and ICC involvement, and by mass campaigns such as those in the US by Enough and Invisible Children.

Meanwhile, it can be argued that incomplete analyses by many agencies failed to adequately perceive that their interventions were framed by the dominant discourse. International NGOs and other intervening bodies have tended to highlight aspects of the war falling within their own remit, whether in the field of

human rights, justice, health or others (AI 1997; HRW 2003a; Ministry of Health of Uganda and World Health Organisation 2005; War Child 2015). More recently those seeking the clarity of simple messaging for mass communication have presented their audience with clear moral choices apparently linked to decisive actions to resolve the conflict, as opposed to complex ethical dilemmas and questionable remedies (Benner and Prendergast 2011; Invisible Children 2013).

Academic research on the ground highlighted specific issues of great urgency, further demonstrating particular inadequacies of the dominant discourse. In-depth research by Dolan (2011: particularly 72-106), for example, brought the Ugandan government's degree of responsibility for civilian suffering to light; Baines (2007) has documented traditional reconciliation practices relevant to alternative approaches to justice; while Allen (2006b) has promoted critical examination of these and other aspects of the conflict, such as the international focus on abduction of children over adults. Finnström (2008: particularly 71-74) identified clearly the powerful and relevant political context within which the war unfolded, as well as its frequent misrepresentation (Finnström 2012). Branch (2011) has brought into question the benefits and legitimacy of external interventions, while the Acholi Religious Leaders' Peace Initiative (ARLPI) and others on the ground have provided a more detailed and nuanced analysis of events rooted in their full history, founded upon the experience of civilians over the preceding decades (Dolan 2000b; ARLPI and JPC 2001; HURIFO 2002; Oywa 2002; Rodriguez 2004a; Rodriguez Soto 2009).

As already indicated in the Introduction, this chapter takes an evidence-based approach drawing upon academic studies by researchers, peace workers, and local CBO staff who lived and worked on the ground, survey data drawn from the community by local and other organisations, and the lived experience of the researcher and others referenced in the text. With diverse academic, local, and original material, it offers an account of the conflict that is to a significant extent sited within its political, social and economic context, and grounded in the experience of civilians caught up in the violence.

4.1 The origins of the war

Before embarking on an analysis of the conflict it is necessary to acknowledge the complexity and difficulties associated with notions of 'ethnicity' and 'tribe'. In Uganda, as elsewhere, perceptions of identity in these respects are strong, and Uganda's post-colonial history is significantly influenced by them. Notions of ethnic allegiance, often including possession of a common language as well as shared social and cultural practices, have frequently been mobilised for political purposes (Smith 1986). Understandings of ethnic or tribal identity and their basis are much debated, but the comprehension of these perceptions as a social construct that can change over space and time is pertinent. A constructivist view that does not accept ethnicity as a basic human condition, but acknowledges it in so far as it is useful to interpret events, is appropriate in this instance (Abizadeh 2001; Murji and Solomos 2015). In this context, the Acholi in Uganda, those people from Acholiland, are considered those who identified themselves as such. They principally lived in the Districts of Kitgum and Gulu, as they were defined in 2000, spoke the Acholi language and conformed in the broadest sense to Acholi social and cultural norms. Today those districts have been subdivided, encompassing Gulu, Amuru, Nwoya, Lomwo, Pader, Kitgum, and Agago.

'Community', and the notion of 'community leaders', are also constructs requiring some clarification, and another field of considerable academic study. The common understanding of community as a social unit within a single geographical location with shared identity, norms and values, is relevant here (Nisbet 1970; James 1996). In this study, unless otherwise indicated, the term is used to refer to the Acholi community in northern Uganda, the principal victims of both sides in the war (Girling 1960). When doing so it is acknowledged that, as within any group, individuals within it held a wide range of views, perceptions and experiences. A community view has only been indicated where it was founded upon evidence of very widespread support, such as in the popular strongly held desire for peace, food, an end to the killings

and abductions, and permission to return to their homes. These issues will be examined below.

The community leaders indicated in this research are most commonly those with prominent positions in the principal civil society organisations with strong constituencies across Acholiland—the religious and traditional leaders. These institutions commanded very widespread popular engagement across the region, though not unanimous support. Due to the nature of such institutions these positions were dominated by men. However, prominent women were also amongst the leadership group, including figures such as Rosalba Oywa, the director of ACORD, and Angelina Atyam, the founder and director of the Concerned Parents' Association (CPA) based in Lira.

4.1.1 The roots of discord

The war in northern Uganda is popularly considered to have begun in 1986, when Museveni came to power in a military coup. At this point his National Resistance Army (NRA) forces swept north, driving the remnants of the defeated United National Liberation Army (UNLA) before them. Many of the UNLA forces were Acholi, and while some disbanded and returned to their homes, others sustained some level of resistance within northern Uganda or from southern Sudan. NRA efforts to crush these forces were only partially successful, and subsequent decades saw sustained military resistance—a circumstance that brought about a succession of rebel movements. These events culminated in the LRA war, an account of which is provided in the following sections (Gersony 1997; Allen and Vlassenroot 2010).

Inter-tribal rivalries significantly pre-dated the LRA war. Decades of British colonial rule were characterised by differential treatment of Uganda's tribes. While the Baganda in the southern central area of the country were selected for administrative and business roles, northerners in general and the Acholi in particular were recruited into the army and police. The British presided over a

system in which northerners were marginalised in employment and education, investment and infrastructure. Through mechanisms such as these the Ugandan state came to be established upon deep economic and social rifts that exacerbated ethnic divides (Gersony 1997; Branch 2010a).

These divisions were intensified by post-independence mis-rule. Milton Obote (Prime Minister and then President, 1962-71, 80-85) a Lango from the north adjacent to the Acholi region where the war has been centred, and Idi Amin Dada (President 1971-79), a Kakwa from the north west across the Nile, were responsible for gross human rights abuses by the army and other security forces. The Acholi comprised a significant proportion of Obote's military, and became associated with his abuses. After Obote's overthrow in 1971 Amin brutally purged the military of Acholi and Lango tribes, and persecuted prominent Acholis in Kampala and the North, forcing many into exile. However, following the ousting of Amin in 1979 Obote was re-elected in a poll characterised by violence and accusations of vote rigging. Subsequently the Lango-Acholi alliance of northerners was renewed, and the Acholi were again recruited in large numbers into the army. It is thought that at this time 30-40 per cent of the army were northerners (Allen 2006b: 25-55; Dolan 2011: 39-71).

These events prompted Yoweri Museveni, a Banyankole from the south-west, to launch his National Resistance Movement (NRM) and NRA guerrilla war in 1981. Basing his operations in the Luweero Triangle north of Kampala, he was able to recruit Baganda from the central area and Banyarwanda (Tutsi migrants from Rwanda) to join his Banyankole forces (Allen and Vlassenroot 2010). During the ensuing brutal counter-insurgency war, the Acholi were popularly seen as responsible for Obote's atrocities (Museveni 1997). It was not until 1985, with the increasing success of the NRA rebellion, that Ugandan military support for Obote faltered. In July a coup led by Gen. Basilio Okello's Acholi forces ousted Obote from Kampala, and Gen. Tito Okello was sworn in as the first Acholi President of Uganda. His premiership was short-lived, and the peace treaty signed with Museveni in December 1985 did not last. In January

1986 the NRA seized power in a coup, and Museveni was able to install himself as President.

These events have left deep and lasting inter-ethnic grievances on all sides. Led by Museveni, the mainly Bantu tribes from the south perceived themselves as having been robbed of their imminent victory over the Uganda National Liberation Army (UNLA) by Okello's coup. Having been the victims of violent misrule at the hands of Obote and Amin, and perceiving recent atrocities in Luweero as perpetrated primarily by northerners, there were powerful motivations to seek redress and revenge. Observers have noted that official NRA media sources at the time perceived the Acholi to be significantly responsible for events (Behrend 1999; Finnström 2008: p75).

On the other hand, the Acholi and other northerners had suffered (and continue to suffer) decades of political and economic marginalisation by the British and post-independence governments, in addition to their persecution by Amin. Their hopes of power and the opportunity to address these inequalities in their favour glimpsed in 1985 with the installation of the Obote regime, had been dashed by Museveni's seizure of power. This was an act many of them interpreted as betrayal.

By 1986 the context for the war in northern Uganda was one of powerful and justifiable inter-ethnic grievances. There was an absence of social or political processes sufficiently strong to contain the resulting animosities—enmities that had developed and been nurtured by many parties in their efforts to secure or maintain power and dominance. As Dolan explains, 1986 was a year in which the ongoing political and military conflict in Uganda underwent a dramatic shift in power, and while the war in the north can be traced back to this point, the preceding account demonstrates that it was the latest manifestation of a conflict with roots in profound historic injustices. Subsequent events involved a sequence of Acholi rebel groupings and leaders, each drawing strength and legitimacy from this powerful political, social and economic situation (Lucima 2002).

4.1.2 Reshaping of the divide (from 1986)

The first decade of the northern Uganda war did little to address these grievances, and much to exacerbate them. During 1986 the Acholi remnants of the UNLA forces loyal to Tito Okello fled to Acholiland, pursued by the NRA. However, armed resistance did not commence at this time, and when the NRA arrived in Gulu in March 1986 they met no opposition from UNLA forces, who returned to the rural areas or retreated to Sudan.

Branch (2011) has outlined the weakness of Acholi civil and political structures at this point, the challenges presented by the large influx of former UNLA forces, and the role of lineage authorities in absolving them of their past misdeeds and assisting in their reintegration. NRA abuses in the north were significant at this time, and included the detention of hundreds of civilians in the search for weapons caches. Branch's account suggests that the insurgency that emerged was to a large degree the result of abuses by the NRA; that Acholi military resistance was preceded by a misconceived NRA counter-insurgency operation during this period. Certainly widespread violence against the population took place, including a massacre by the NRA of over 40 civilians in NamOkora in late 1986, and many instances of male rape by the NRA's Second Division (AI 1999; Lamwaka 2002; Branch 2011: 45-89; Dolan 2011: 44-45). The period was also characterised by looting across the entire region of most of the Acholi cattle by Karamojong raiders and NRA forces, a process that stripped the population of a significant proportion of its wealth (Finnström 2008: 71-74; Dolan 2011: 40).

4.1.3 The Uganda People's Democratic Army (UPDA) emerges (from 1987)

While the military confrontation across the ethnic north-south divide was reshaping itself and escalating once more, the possibility of political dialogue being used for national reconciliation was receding. The Acholi were largely removed from positions of power at a national level, and popular representatives in the north were bypassed in favour of more pro-government candidates (Omara-Otunnu 1987; Branch 2011: 111-118). Events such as these seem to have been instrumental in galvanising support for further Acholi armed resistance, particularly the newly forming Uganda People's Democratic Army (UPDA) comprising mainly former UNLA fighters. In the deteriorating political and security situation the Acholi civilian population hoped for some measure of protection. UPDA demands for human rights and political representation had some credibility, and thus they achieved some measure of approval from Acholi traditional authorities. However, in later years, some of the Acholi traditional leadership accepted responsibility for blessing or endorsing the armed insurgency (Gersony 1997).

Despite the support it received, the UPDA was unable to make military progress against the NRA, and before the end of the year its forces and those from the UNLA began to break up under a combination of military and social pressures (Branch 2011: 66). Some remnants regrouped around a spirit medium, Alice Auma, who came to be known as Alice Lakwena. Her Holy Spirit Mobile Forces, the military wing of the Holy Spirit Movement (HSM), grew in numbers from late 1986. With the aim of cleansing Uganda and overthrowing Museveni she instilled in her followers the belief that they could walk into battle singing religious hymns, would be unharmed by bullets, and that stones thrown by them could turn into grenades. During late 1986-87 the HSM won significant success, and was able to advance towards Kampala, only eventually being defeated at Jinja, where a crossing of the Nile would have left them only 80km from the capital (Behrend 1999).

In 1988, the following year, elements of the UPDA and the Government signed the Pece Peace Agreement in Gulu.[11] Some of the remnants of the UPDA were subsequently recruited into the NRA; however, this did not herald an end to the war as other factions remained in the bush (Allen and Vlassenroot 2010: 29).

4.1.4 Abuses by both sides (late 1980s)

Alice's father Severino Lokoya also worked to regroup certain rebel elements at this time, until his arrest in 1989. These events enabled Joseph Kony, an Acholi from Odek who also claimed to be related to Alice, to unite many of the remaining forces under his control. From this beginning Kony was able to establish what was to become the Lord's Resistance Army (LRA) (Behrend 1999).

The betrayal of the Okello regime by Museveni in 1986 was widely felt, but Kony apparently perceived the Pece agreement as further duplicity on the part of the demobilised UPDA elements, again with the collaboration of Museveni (Behrend 1999: 173-174). Furthermore, while Lakwena's success against the NRA in late 1986 had brought her some degree of popular backing, by the late 1980s civilian enthusiasm for further armed conflict was dwindling. Just as Kony came to lead the rebel movement, so he found popular enthusiasm for his campaign falling away. Within only a few years the LRA was obliged to resort to coercion in its recruitment efforts (Gersony 1997; HRW Africa and HRW Children's Rights Project 1997).

Kony's sense of betrayal by Museveni and mistrust of his own community may have been further heightened by NRM engagement with the Acholi population. The NRM government was at this time strengthening its Resident Commissioner/ Local Council representation on the ground. This involved establishing a system of locally elected representatives alongside government

[11] Pece is a suburb of Gulu which holds the stadium where the peace deal was signed.

appointed officials in all rural areas. These posts were apparently intended to represent local views and opinions to the Movement government, while equally having the potential to operate as a tool with which to gain information to combat the insurgency in the villages. The LRA thus came to identify these posts as an arm of the state, and an enemy within, whether or not the individual concerned was a legitimate local representative. Thus, in Kony's eyes, elements of the civilian population soon became targets to be cleansed from Acholi society, by violence if necessary (Branch 2010a; Branch 2011: 69-75).

The late 1980s was thus a period in which civilians continued to suffer at the hands not only of government forces whom they perceived as an occupying army, but also rebel factions willing to punish individuals and communities for their perceived collusion with the government. In rural areas people often slept in the bush, hiding from forces who might accuse them of sympathies with their enemies; people became increasingly alienated from the rebels who claimed to represent them.

Then, from 1990-91 the Government's Operation North launched a brutal counter-insurgency offensive. It coincided with severe losses to HIV of NRA officers, and faltering steps to create a more professional national army. These factors may have hampered efforts to instil discipline. Travel was restricted, and communications between the north and the rest of the country were disrupted. Many civilians were rounded up for screening, and those without papers were liable to be shot. Additionally the population was organised into 'Arrow Brigades', an act that significantly antagonised the LRA, and effectively placed civilians on the front line of the conflict. Units armed with bows and arrows or other traditional weapons were expected to defend themselves against armed rebel attack. Even as the northern Uganda war was entering a wider regional dynamic, civilians were already finding themselves caught between fighting forces each seeking to extend their control over the population (AI 1991; Lamwaka 2002; Rodriguez Soto 2009: 29; Branch 2011: 72-80).

4.1.5 Internationalisation of the conflict (from 1991)

In August 1991 the Government announced that Kony had been defeated, and Operation North was wound down (Rodriguez Soto 2009: p30). However, others have argued that the main impact of Operation North was the alienation of the civilian population (Allen and Vlassenroot 2010: 11). In any event, new dynamics were emerging that would serve to decouple the conflict from its domestic Ugandan constituencies and sustain the violence. The war was acquiring its international dimension. General Al-Bashir had come to power in Sudan through a bloodless coup in 1989, and allied himself with the National Islamic Front. As the cold war ended, the US perceived the emerging threat of Islamic extremism, and began support for the Sudan People's Liberation Army (SPLA)'s independence struggle. This brought Uganda to the US front-line, and through this new prominence Museveni's administration was able to secure significant diplomatic, financial and logistical support from the US for its efforts. John Garang himself, the SPLA leader, was seen in Gulu in 1991—a sign of the strengthening links between Sudan's rebel movement and the Ugandan Government.

In retaliation Sudan began delivering assistance to Uganda's own insurgency—the LRA. This included money, arms and logistical support. The tit-for-tat relationship between Uganda and Sudan, each backing the others' rebel group, had begun (Gersony 1997; International Crisis Group - ICG 2004). One effect of Sudanese intervention may have been to free the LRA from the necessity to nurture a civilian constituency in support of its war. Certainly the shift from a tactic of selective attacks against the population to more indiscriminate violence, apparently intended to demonstrate the Government's inability to control and pacify the North, coincides with this development. Additionally targeted punishments intensified, focused upon Acholi officials perceived to be aligned with the government, compliant to its demands, or found disobeying LRA dictates. The LRA practice of mutilating civilians began, and included the

cutting of lips or ears and the amputation of limbs of those suspected of spreading news, collecting information, or passing messages (AI 1997; HRW Africa and HRW Children's Rights Project 1997; Branch 2011: 80-87).

This juncture was significant. For the first time both of the military protagonists in the Ugandan conflict, Government and LRA, could afford to prosecute the war independently of local support, backed by international actors for whom humanitarian consequences in northern Uganda were but one strategic consideration amongst others. This would not be the only instance of the decoupling of the conflict dynamics from community concerns (Doom and Vlassenroot 1999: 25-26; Allen and Vlassenroot 2010: 9-12; Mwenda 2010).

4.1.6 The 1994 peace talks

Despite these ominous developments, during 1992 the Arrow Brigades were disbanded by the government, and from the middle of that year and onwards to the end of 1993 the security situation improved. As it transpired, the conflict was displaying its longer term tendency to rise and fall in intensity over time (Dolan 2000b). At this time LRA groups were even seen openly in Gulu town, and there was increasing optimism that peace could return. Many believed that the war had effectively ended (Gersony 1997: 39-41).

Contacts between the Government and LRA, led by Betty Bigombe, the Minister of State for Pacification of the North, took place and led to a ceasefire towards the end of that year. In early 1994 talks led to a request by Kony for a six month period to allow him to gather LRA forces in preparation for disarmament. Hundreds of LRA soldiers came to trading centres, anticipating an end to the hostilities. At the same time there was considerable distrust between the two parties, and speculation that this period of calm might be used by the LRA to recruit (with the promise perhaps of resettlement packages following successful talks), and to negotiate military support from Sudan (ibid). Some local sources have indicated verbally to the author their belief that the LRA were using the

period to regroup. The Ugandan military may also have perceived a chance to crush the rebellion quickly at this point, without the need for talks. Overconfidence that the army could quickly defeat the LRA has long been a characteristic of Government perceptions, and significant elements of both sides may have been opposed to a deal.

Whether prompted by these considerations, or other motives, on 6th February 1994 Museveni gave the LRA a seven day ultimatum to surrender. This precipitated the collapse of the process, and hostilities resumed (Rodriguez Soto 2009: 31). The next major opportunity for peace was more than a decade later.

4.1.7 Sudanese support for the LRA: multiple atrocities and mass abduction (from 1995)

On the ground in northern Uganda throughout the 1990s and 2000s, spells of relative calm followed by more extreme violence were apparently associated with the movement of LRA forces between Uganda and Sudan (Gersony 1997). Facilitated by Sudanese military assistance, the period that followed was characterised by deliberate and intensive LRA targeting of unarmed civilians and use of new weaponry such as landmines. Sudanese support increasingly enabled the LRA to operate from bases in the south of Sudan, where training and preparation of abductees could take place, and from where groups could be sent back to Uganda to engage the UPDF, attack civilians and abduct future fighters (Dolan 2000b; Rodriguez 2004b). As well as the ongoing low level (but often appallingly brutal) violence, Gersony (1997) identifies 'signal incidents'. These included the Atiak massacre in April 1995 in which approximately 200 civilians were killed, many of them executed; the Karuma/Pakwach convoy ambush of March 1996 in which approximately fifty civilians, many of them bus passengers, were burned alive or executed; the Acholpi refugee camp massacre in July 1996, in which at least 100 were killed; and the Lokung/ Palabek massacre in January 1997 when well over 400 were systematically

clubbed or hacked to death—then the largest LRA massacre in Uganda of the war.[12]

Attacks were not limited to this period, and indiscriminate LRA violence towards the civilian population continued during the following decade, often taking place on a daily basis. Later, other large-scale massacres occurred including those of Pajong in Mucwini, where 90 were killed in July 2002; Amyel in October of the same year in which 120 died; and Barlonyo, Lira (a district in Lango) in 2004 where close to 300 were massacred (UN Office for the Co-ordination of Humanitarian Affairs - UNOCHA 2004; Rodriguez Soto 2009: 33,118). By this stage attacks were not confined to the Ugandan Acholi population; killings and other abuses were also taking place more widely in Uganda and Sudan. When challenged, apologists for the LRA, and even Kony himself, have claimed that such horrific actions against the civilian population were not its own (Schomerus 2010).[13] These denials have little credibility, particularly as they are contradicted by multiple local sources from the communities themselves suffering the violence, and recorded in local survey-based reports (ARLPI and JPC 2001; HURIFO 2002; ARLPI et al. 2003 and author's widespread observations).

In addition to committing atrocities in Uganda, the LRA's direct military engagement against the SPLA necessitated a larger force, and in the absence of opportunities to recruit from the increasingly alienated local population it increased its practice of abduction of civilians, particularly youth, to augment its numbers (AI 1997; Allen and Vlassenroot 2010: 12; Branch 2011). This is not to say that abduction was always a simple process of kidnapping young people from their homes. While extreme coercion was often used and violence deployed to retain those taken, this is an overly simplistic view of LRA practice

[12] Exceeded only by the Christmas Massacres in DRC following the breakdown of the Juba talks.

[13] The author encountered members of the Acholi diaspora in London in 2000 and 2003 who, perceiving the Ugandan Government's hostility, mistakenly believed that the LRA were innocent of these crimes. The diaspora organisation Kacoke Madit did much to challenge such misperceptions during this period and subsequent years by improving communication between communities suffering atrocities and the Acholi diaspora.

as others have demonstrated (Allen 2006b: 60-71; Mergelsberg 2010). Notwithstanding these complexities, the term abduction is still broadly accurate to describe the LRA's means of securing new fighters into its ranks.

Evidence indicates a pattern of taking adolescents consistent with their perceived ability to fight and survive in the bush (Blattman and Annan 2010). Many hundreds were abducted from 1995 onwards. The Gulu-based NGO Human Rights Focus (HURIFO) for example, report an LRA target of 1,200 child abductions in Kitgum alone for 1995; and quoting church sources they indicate that this target was easily exceeded (De Temmerman 2001; HURIFO 2002: 14). By 1997 Human Rights Watch estimated that between 6,000 and 10,000 had been abducted over the preceding two years, with half of them remaining in the bush (HRW Africa and HRW Children's Rights Project 1997: 3-4; Doom and Vlassenroot 1999: 25). Abductions were reduced between 1999 and 2001 with only some hundreds being taken (reflecting a quieter period in the war), but resumed in 2002 when between June 2002 and March 2003 Human Rights Watch estimated 5,000 new abductions, and 3,000 in 2004 according to the UN Office for the Co-ordination of Humanitarian Affairs, UNOCHA (Government of Uganda and UNICEF 2001; HRW 2003a: 2; UNOCHA 2004: 1; Dolan 2010). The proportion of total LRA's numbers who were originally abducted has been much discussed, but evidence suggests that an approximate figure of 80 per cent is likely (Blattman and Annan 2010: 135).[14]

[14] It should be noted that the role and experience of abductees is complex, though beyond the remit of this research to discuss (HRW Africa and HRW Children's Rights Project 1997; Nordstrom 1997; Nordstrom 2001; ARLPI et al. 2003). Abduction itself is discussed at greater length in section 4.3

4.1.8 Engagement with Sudan, Operation Iron Fist and LRA retaliation—intensification of the conflict (from 1995)

In relation to efforts for dialogue, there had been a long track record of efforts to engage the LRA and its predecessors in Sudan. Lamwaka indicates that first contacts across the border with the UPDM/A took place in 1986/7, and describes early efforts for peace and their collapse prior to commencement of talks, after an attack by Ugandan government forces (Lamwaka 2002: 29-30). A decade later efforts to engage the LRA/M took place in Khartoum as part of the international Kacoke Madit peace efforts sponsored by the Italian Community of Sant' Egidio, in collaboration with local efforts for peace by the Acholi religious and cultural leaders. Contact with the Sudanese Government also occurred, and while diplomatic relations between Uganda and Sudan were cut off in 1995 ostensibly because of Sudanese support for the LRA, efforts to re-engage the Sudanese were underway again by 1999. These gained momentum through the efforts of the Carter Center leading to the Nairobi Agreement at the end of that year, signed by Museveni and Bashir, which was intended to give impetus to efforts to resolve the conflict (Neu 2002; Allen and Vlassenroot 2010: 13; Dolan 2011: 50-51).

The Carter Center work paved the way for subsequent initiatives, and in 2000 the Sudanese and Ugandan Governments agreed to cease their reciprocal support for each other's rebel movements, and that LRA bases in Sudan should be relocated 1,000km north of the Uganda border. While this provision was not implemented at the time, the resumption of diplomatic relations between Uganda and Sudan in August, and the US declaration of the LRA as a terrorist organisation in September 2001, contributed to more concerted action. Four months later Ugandan troops were already massing in the north in preparation for an offensive (Neu 2002; Otto 2002: 56-57; Dolan 2010).

UPDF Operation Iron Fist was launched into southern Sudan in March 2002. It was intended to destroy the bases out of which the LRA had been operating in

recent years, and took place with the consent of the Sudanese authorities and in the context of the US 'War on Terror' (New Vision 2002). Government rhetoric was characteristically bold, anticipating a decisive blow to the rebels; however, on the ground in northern Uganda there was considerable scepticism that the offensive would prove successful, and much concern that the LRA's retaliation against the civilian population would be brutal. In the event the UPDF was successful only in destroying LRA bases, not the LRA itself. This setback was matched by its failure to rescue abductees. By June, of the 3,000 LRA members whose return had been hoped and prepared for, UNICEF indicated that only two infants had been rescued (Dolan 2011: 54). Over the course of subsequent months local fears were realised, and the LRA returned to Uganda visiting its campaign of atrocities and abduction upon an unprecedentedly large area, engulfing neighbouring districts of Lira and Apac, and parts of Soroti well beyond the Acholi and Langi borders. LRA violence over the following years included the aforementioned Barlonyo massacre on 21st February 2004, and for a period even greater numbers were displaced, well beyond the Acholi region (Justice and Reconciliation Project - JRP 2009). Operation Iron Fist II was to follow from March 2004, redoubling the UPDF's efforts in southern Sudan, though again failing to prove decisive.

4.1.9 UPDF conduct (to 2004)

In the context of LRA abduction of children it should be noted that the Ugandan Government has itself used children in the armed forces, and has sometimes acquired them by coercion (HRW 2003a; HRW 2003b). This has not been on the same scale as the LRA, and use of children in the Local Defence Units, for example, did not involve abduction and the same brutal treatment as that received by LRA abductees. But the use of child soldiers nevertheless contravenes international standards and International Criminal Law in relation to under-15s since at least 2002 (Robertson 2006: 103). The Gulu-based human rights organisation HURIFO also report this practice being resented by the local population and associated with other abuses (*Rome Statute of the International*

Criminal Court 1998; HURIFO 2002: 57; Coalition to Stop the Use of Child Soldiers 2008).

Equally concerning, the UPDF response to LRA attacks including the 'signal' incidents was often very slow indeed. LRA looting of villages or camps could be quite systematic due to the time made available by this practice. Following their arrival in a settlement and prior to any response from the Ugandan military, abductions by the LRA could be organised to include every suitable adolescent and child (Weeks 2002: 10). The major incidents previously mentioned provide examples. At the Atiak massacre in 1995, after the few local defence youth were overrun by the rebels, the army failed for six hours to respond to the LRA's lengthy perpetration of an organised atrocity. This included the hacking to death of 250 people, which took place in Ayugi Valley only 6km from the settlement, and close to a large military detachment. The UPDF arrived after the LRA had withdrawn (Gersony 1997: 44; Allen and Vlassenroot 2010: 12). Following the attack on Acholpi in 1996 in which 100 were murdered, the UPDF arrived from their nearby detachment a full two days after they received news of the LRA's attack, too late to engage the LRA, even though the atrocities took place over more than a day (Gersony 1997: 47-49; Rodriguez Soto 2009: 33). In the case of the Lokung massacre in 1997 (involving 400 deaths) the local UPDF force arrived at the scene five days after the killings began (ibid). These examples of the UPDF's failure to protect the people even in the face of some of the most extreme incidents are indicative of a wider practice also noted by Dolan (2011: 145-146). By the early 2000s complaints by civilians concerning these and similar occurrences were widespread throughout the north (Otunnu 2002; Weeks 2002: 10; ICG 2004; Mamdani 2010).[15]

The UPDF's misconduct was not limited to passively allowing the LRA to massacre civilians. The UPDF also committed violent acts against the civilian population itself, albeit on a much smaller scale. Otunnu and Gersony indicate

[15] During my work supporting local peace initiatives on the ground, we frequently encountered communities where such accounts were widespread across Ugandan Acholiland.

UPDF brutality from the late 1980s; Dolan thoroughly documents the civilian experience of being the victim of both sides in more recent times; and UPDF brutality and killings are reliably documented up to 2004 (Gersony 1997; Otunnu 1998; Branch 2004; HRW 2005: 6; Otim and Wierda 2010; Dolan 2011: 144-157). Regarding the period leading up to the ICC intervention the literature provides numerous examples. In June 2002 the rebels attacked Purongo, killing two or more, abducting others and burning 50 huts. The UPDF detachment responded by withdrawing from the camp, a civilian settlement, and shelling it killing at least five. Fifteen civilians died overall, though the government *New Vision* newspaper attributed all deaths to the LRA (Finnström 2008: 156-157). In October of the same year, after the LRA's Amyel massacre, the UPDF response included killing seven civilians, in addition to over 100 killed by the LRA. Less than three months later in January 2003 the UPDF responded to the LRA abduction in Pella near NamOkora by indiscriminately bombing the area in which the LRA were moving, killing nineteen, mostly child abductees whom the LRA had tied to each other to prevent escape. The *New Vision* reported them as rebels put 'out of action' (Rodriguez Soto 2009: 116-119). These acts closely preceded Uganda's referral of the LRA to the ICC at the end of that year—they were the immediate context into which the ICC intervened.

Thus far, this account has mainly concerned the events that are frequently referred to as the backdrop to the war: the historical roots of the conflict; the LRA's campaign of violence; the UPDF's offensives; internationalisation of the conflict; and (in the more balanced accounts) some indication of UPDF abuses. It is a narrative of the war largely viewed from a diplomatic level.

It is also pertinent to note that the role of civilians in the conflict is complex. While most of the population was not involved in committing violence on either side, and was principally engaged in seeking to secure food and the other basics for survival, the role of some individuals is complex. Children and youth were forcibly taken by the LRA, and targeted by the UPDF. Many grew up in the LRA, traumatised and coerced to remain, yet coming to occupy an

ambiguous position between pure civilian and combatant. Such roles have been commented upon in the literature on 'new war' (Duffield 2001; Münkler 2005; Kaldor 2013). In this study, due to the violence administered by both armed sides against the abductees, and the widespread lack of support for the LRA and government by 2000 (notwithstanding its political roots), terms such as 'troops' and 'wives' that are frequently used in texts on the LRA have been avoided.

The sections that follow highlight events that are less well understood, are commonly misrepresented, or are more often absent from mainstream accounts. Yet they are no less well evidenced, and they are central to the civilian experience of the war. Lacking the mouthpiece of a national newspaper or government institutions to promote their perspectives, or the prominence bestowed upon those who commit the most shameful mass atrocities, the civil society and community perspectives have been both passively ignored and actively stifled. Restricting the analysis to evidence already publicly available, this account will highlight three aspects of the conflict that shaped the community's experience: the creation of the camps and particularly their impact upon the population; the dynamics of the conflict from a civilian perspective; and the community's estrangement and dissention from both the LRA and the government's actions and strategies for prosecuting the war, and their alternative efforts to secure peace.

4.2 The camps—a military strategy with humanitarian consequences (1996 onwards)

Despite the UPDF's unresponsiveness to LRA attacks and its violence towards people, in 1996 the Ugandan government reacted to the crisis by requiring the population to move to 'protected villages' closer to UPDF detachments (HRW 2002a: 1). Commonly known as the 'camps' these settlements were seen by many as 'protecting villages' because of the UPDF detachment's position, usually in the centre (Otunnu 1998; Finnström 2008; Branch 2009: 131-165;

Branch 2011: 75-78). The process of the creation of the camps has been poorly understood by many, some perceiving them as principally a civilian response to the insurgency. This is inaccurate. Interviews with the population on the ground by ARLPI and the Justice and Peace Commission of Gulu Archdiocese (JPC Gulu)[16] in 2000 and 2001, a period in which the author was working closely with the two organisations, has yielded a more informed and complex picture (ARLPI and JPC 2001; HURIFO 2002; Weeks 2002: 2-3; HRW 2005; HRW 2011b: 24-25). The issue of their creation and continuation through to 2007 is important, as deaths in the conflict have been shown to be much more often caused by the displacement, and concomitant destitution and health issues, than by the physical violence and atrocities of the war itself (Ministry of Health of Uganda and World Health Organisation 2005; Mwenda 2010).

Up to 2001 in Kitgum District (at the time Acholiland east of the Aswa River[17]) LRA violence was instrumental in the creation of the camps. In the late 1990s, partly in response to the intense violence of the 'signal incidents', people moved to the main trading centres seeking protection from LRA attacks and abductions. ARLPI reports that by 2001 these spontaneous settlements contained perhaps 20 per cent of the population. Displacement at the hands of the LRA to this point then was significant in this part of Acholi.

In Gulu District (at the time Acholiland west of the Aswa River), events were more dramatic. The same period saw most of the population (ARLPI estimate 80%) moved to camps by the UPDF, the displacement taking place on the instruction of President Museveni. Beginning in mid-1996 the population was instructed to move to the main trading centres with little notice, and this was militarily enforced. As a result of these actions, and despite contrary instructions from the LRA to move deeper into the bush (which people ignored at their peril), the civilian population was forced to abandon their homes and possessions, food, crops and livelihoods as directed by the army (HURIFO

[16] The two principal religious organisations from the community active for peace in the region.
[17] District boundaries have changed a number of times over the period in question.

2002: p15). On arriving at the trading centres they found no provision for shelter, sanitation, water or food, and once located in the camps the UPDF announced that anyone found outside could be shot as a rebel collaborator—a message that the UPDF subsequently enforced (Rodriguez Soto 2009: pp102-3). Driven by government forces from their homes, and largely prevented from returning for food or belongings, large sections of the population became destitute. On the basis of their on-the-ground observations throughout this period, and interview data, ARLPI believe that many children died during this period as a consequence (ARLPI and JPC 2001: 10; HURIFO 2002: 8; Branch 2007b: 181; Branch 2011: 76-78).

Subsequent years saw a continuing dramatic rise in displacement across the whole of Acholiland and some neighbouring areas, from under 110,000 in 1996, to over 500,000 in 2001 (Dolan 2011: 108). Operation Iron Fist which began in March/April 2002, led subsequently to LRA reprisals upon civilians which caused people to flee to the main centres, and Rodriguez records a further 48 hour Government ultimatum to the population to leave their homes at the end of September 2002 (Rodriguez Soto 2009: 102, 106). In that year those displaced rose to approximately 800,000, and by 2003 over 1.2 million people were displaced in the Acholi and Teso sub-regions (UNOCHA 2003: 12). Following further LRA violence after Iron Fist II this rose again to approximately 1.6 million (over a larger geographical area) in 2004. By this stage 90-95 per cent of the population of the Acholi sub-region were displaced, due to the violence of both armed groups (UNOCHA 2005a: 1). This timing is significant, as it was in the middle of this year at the height of this emergency that the ICC Chief Prosecutor opened his investigation.

4.2.1 Rationale 1—civilian protection

Broadly, three rationales have been put forward to explain the creation of the camps. The one most closely associated with an 'official discourse', as Finnström has critically observed, relates to civilian protection. The population

were forced into the camps for their own protection, moving them to centres where the UPDF was better able to protect them. However, any assumption that the army was principally occupied in defending the population has been contradicted by painstaking research. Dolan has worked extensively with communities in northern Uganda recording people's experiences of violence against themselves and their property between 1986 and 1999. While the LRA is certainly revealed as the most active and brutal perpetrator, incidences of torture, rape, shootings, killing of relatives, and other crimes were often carried out by the UPDF (Dolan 2011: for example, 57-62). From his extensive experience as a priest and peace activist in northern Uganda, Carlos Rodriguez Soto also records incidents of UPDF violence, including against children after 2000 (Rodriguez Soto 2009: 101, 116-117). Even as recently as 2005, during UPDF efforts to enforce ICC warrants, US government cables released through WikiLeaks indicate that the US ambassador required the Ugandan government to consult with him in advance if the UPDF intended to use US intelligence to commit war crimes (Hepple 2010).

Further undermining the suggestion that the camps were created primarily to protect civilians, Branch and others have observed that although the UPDF detachment could provide some sense of security to the population, their numbers were often far too few to provide protection. In some camps, there was less than one soldier per 1,000 inhabitants (Civil Society Organisations for Peace in Northern Uganda - CSOPNU 2004; Branch 2007b: 181)—sufficient to pose a threat to unarmed civilians taking the risk of returning to their homes for food or belongings, but insufficient to provide meaningful security in the event of an armed LRA attack.

Additionally, the camps did not effectively prevent abduction. The period before and after their creation was associated with intense violence against civilians by both sides. In relation to abduction, a crime for which the LRA bears unequivocally by far the greatest responsibility, there was an ongoing failure of local, national and international agencies to successfully protect the civilian population. This issue was highlighted nationally and internationally through

advocacy work by parents of those abducted throughout this period. The failure of measures to prevent abduction was both consistent, and nationally and internationally publicised by the NGO of parents of abductees, the Concerned Parents Association (CPA). UNICEF reported nearly 29,000 abductions between 1986 and 2001, nearly 13,000 of which had not returned, 5,500 of them children (Government of Uganda and UNICEF 2001). While the period from 1999-2001 had shown reduced activity, UNOCHA reported 8,400 abductions in the year from June 2002. Despite periods of relative inactivity, the LRA's practice of mass abduction was sustained during and following the creation of the camps. Abduction by the LRA continued regardless of the community's displacement to (or incarceration in) the camps.

4.2.2 Rationale 2—prosecution of the war

A second explanation for the government's strategy concerns the prosecution of the war, with a combination of control of the civilian population and indifference to its plight. By this reasoning confinement of the civilian population to the camps would allow the UPDF to hunt the rebels in the rural areas more freely (HURIFO 2002; Rodriguez Soto 2009: 103). This aspect of the second rationale is also compatible with mainstream accounts; however, its implications depart significantly from the official discourse. Amnesty International (AI) claimed that the LRA and UPDF were by this time competing for control rather than the support of the populace, and the camps facilitated government access to the people. As AI state in their 1999 report, 'The control of the civilian population is a strategic issue for the government's Uganda Peoples' Defence Forces (UPDF) as well as for the LRA. This puts civilians of all ages at the heart of the conflict, rendering them especially vulnerable to human rights abuse by both sides' (1999: 13-38). This view is consistent with a speech made two years later by the Second Deputy Prime-Minister Moses Ali (a powerful figure in Museveni's government). He addressed a mixed audience including many local Acholi in Gulu following an LRA attack close by, in which children had been locked in a hut and burned to death. As the Government

representative present, he addressed them directly about the event. This was an audience that was palpably suffering a sense of shock, grief and deep anguish. He denounced them, and the surrounding community from whom the children came, as the sea in which the LRA fish swim (ARLPI and JPC 2001: 11; New Vision 2001).[18] Such conduct stood as an eloquent and powerful expression of the government's position in relation to civilians experiencing commonplace LRA atrocities; and it is consistent with other accounts of government conduct. His statements were greeted with silence from the floor (Dolan 2011).

4.2.3 Rationale 3—collective punishment

A third view contends that the UPDF was not seeking to finish off the LRA or protect civilians, but to contain and sustain the war in the North, or at least tolerate its continuation (Mwenda 2010). Some proponents of this interpretation cite the substantial backing received by the Ugandan Government from international sources that found its way into the military, the business interests of UPDF top brass in the well established war economy of northern Uganda, lingering ethnic antagonism within the Government towards the Acholi, and the persistent failure of the UPDF to deal a decisive blow to the LRA. This account sees Government and UPDF actions as more actively hostile to the Acholi population (Dolan 2005; Dolan 2011: 144-150).

In support of this view, it is clear that UPDF violence could not be put down to the indiscipline or the criminal acts of commanders alone. Incidents of UPDF violence were not confined to the camps and remote areas, nor to instances of isolated brutality and killings. Violations were at times flagrant and co-ordinated, sometimes even occurring in the main population centres adjacent to

[18] Having been told of the atrocity shortly before Moses Ali's speech in Gulu, as a member of the audience the researcher was deeply shocked. Such a message, to the local population who hours before had suffered this appalling atrocity, was stark. The deep silence with which it was greeted by the crowd, with neither forced applause nor remonstration, was equally powerful.

or even inside civil district headquarters. For example in one military operation on the night of 16th September 2002, Gulu prison (the main prison in northern Uganda) was stormed by the army.[19] Investigations revealed that one person had been extra-judicially executed by the army within the prison, while nineteen others were abducted (Lango, Acholi MPs Set Gov't Conditions 2002; AI 2002c; AI 2003; Rodriguez Soto 2009: 100-101).[20] Civilians were already aware that UPDF violence against people commonly went unpunished. These crimes were not isolated incidents of indiscipline, but clearly ordered, sanctioned or tolerated at a high level (HRW 2002a; ICG 2004; HRW 2005). Human Rights Watch observed a 'sharp decline' in human rights observance by the Ugandan authorities in 2003 (HRW 2003b).

Amidst co-ordinated military violence directed at civilians, this third view interprets the creation of the camps as a collective punishment visited upon the Acholi by the Government—'Social Torture' as Dolan has termed it. This opinion was popular amongst those held in them. Interviews with camp residents reveal the intense suffering caused by their displacement (Lomo and Hovil 2004: 6-7; Rodriguez Soto 2009: 103-108; Dolan 2011). Many spoke of damage to Acholi culture and way of life, as well as loss of their homes and livelihoods. In the camps drunkenness and prostitution, suicide and HIV rates were all greatly increased. It was quite common during this period to hear people talk of the Acholi 'becoming finished' as a people, and the LRA itself may have held this view (ARLPI and JPC 2001; Dolan 2011: 180, 220-221).[21] Olara Otunnu, the former UN Undersecretary-General and Special Representative for Children and Armed Conflict, has characterised these events

[19] I was staying a few hundred yards from the prison at the time. There was a prolonged exchange of gunfire audible across the town—it was clearly a significant military incident at the heart of the largest population centre of the region.
[20] I encountered another specific instance of such abuse close to the centre of town in the same period, though my notes on the event are incomplete. After dark one evening while returning home I narrowly avoided becoming caught up in an incident. A UPDF operation unfolded within a few hundred yards of me which culminated in gunshots. Accounts supplied the following morning indicated that the bodies of a number of youths had been found close to the district police station, bound and executed. I have not been able to trace reporting of this event.
[21] I heard this view reasonably commonly from civilians in the camps and main population centres in Acholiland, between 2000 and 2006.

as genocide, perpetrated by the Government; others have observed that they amount to international crimes (Otunnu 1998; Otunnu 2006; Branch 2007b: 182; Dolan 2011: 150-153).

Whether the camps were intended to have this effect or not, and whether the Government sanctioned or simply tolerated these impacts, they were facilitated and sustained by LRA atrocities and UPDF violence. The huge rise in displacement over the period leading up to the ICC's engagement greatly increased civilian death rates. The health and mortality survey by the World Health Organisation (WHO) and Ugandan Ministry of Health in 2005 estimated that 1,000 excess deaths per week were taking place amongst the displaced Acholi population, relative to a non-emergency situation. Their survey included violent deaths, which at the hands of all sides were less than 10 per cent of the total. In their words, the direct and indirect effects of displacement amounted to 'a very serious humanitarian emergency' (Ministry of Health of Uganda and World Health Organisation 2005: iv). There can be little doubt that population displacement to the camps was a central dynamic of the conflict during this period.

4.2.4 Summary

Interpretation of the Government's motivations for creation and maintenance of the camps thus ranges from protection, through control, to punishment of the civilian population. The difficulty of clearly distinguishing their intent may hamper our full understanding, though some conclusions can be drawn.

The evidence of UPDF brutality generally, and during camp creation specifically, based on their massive expansion despite their disastrous impact on the civilian population, contradicts the protection hypothesis. A policy designed to protect the civilian population would have precluded the UPDF from driving them at short notice from their homes using rape or armed coercion, or enforcing it with artillery and bombing by helicopter gunships as was the case;

neither would it neglect to offer them shelter, sanitation or other amenities even to the most vulnerable upon their arrival; nor would it use the threat of violence to prevent people returning to collect food or belongings. Reducing large sections of the population to destitution reliant on emergency food aid is not consistent with a policy of protection. The continuation of LRA abduction from 1996 to 2002, and thus the failure of the camps to offer protection, is also pertinent. Based on the evidence from the ground, the view that the creation and maintenance of the camps effectively protected the population, or was motivated by a desire to protect, is very difficult to sustain (ARLPI and JPC 2001; Finnström 2008: 131-166; Rodriguez Soto 2009).

Explanations relating to control of the population and military strategy against the LRA, or perhaps the insignificance of community interests relative to other strategic military and political priorities, are more plausible. This is particularly the case if one believes that the Government was or became increasingly serious about trying to end the war. Expansion of the camp system despite its catastrophic consequences for the population may have been due to ignorance (wilful or not); and the clearance of the countryside for hunting the LRA may have offered the prospect of military advantages, whether or not these were realised. Yet given the scale of the crisis that unfolded between 1996 and 2005, explanations based solely on control require an unusually high (though perhaps not unprecedented) level of ignorance and indifference to the suffering of the population in order to be plausible.

Interpretations based on collective punishment of the Acholi people are consistent with the evidence put forward by local and international organisations, and researchers on the ground, before, during and after the creation of the camps. Yet this view is not consistent with every act of the Government and UPDF. One prominent counter example in this case is the increasingly positive role played by the UPDF from 2004 in receiving returning abductees and passing them to humanitarian agencies. Another is the Ministry of Health's collaboration with the World Health Organisation to produce the health and mortality survey in 2005. The evidence thus seems to support an

understanding of the creation of the camps based on a mix of control and punishment of the civilian population, with elements of the Government and UPDF more or less hostile to the population; conscious, complacent or ignorant of their devastating impact.

4.2.5 The camps—a crisis inflicted upon the community by government and LRA

This section has brought us to the first of a number of fundamental observations about the conflict that, despite their primary importance in understanding the dynamics of the war and the abundance of evidence available, are frequently overlooked. Central to the civilian experience of the war from the late 1990s was the brutally violent displacement of the Acholi population from their homes to the camps, at the hands of the Government and LRA. This was associated with extraordinary levels of suffering and death; a defining aspect of the war and a crisis inflicted on civilians by both sides. Though some have noted these dynamics, this understanding is largely absent from the official discourse (Mwenda 2010).

4.3 The conflict dynamics—civilians were victims of both sides

4.3.1 LRA politics and tactics—a rational strategy

The LRA has often been caricatured as irrational in its behaviour, or as committing violence mindlessly. These views are perhaps understandable in part as an emotional response to the intensity of the atrocities perpetrated, but they are deficient in important respects. In developing its strategies to address the war it is important not to mischaracterise the LRA as random in its activities, inexplicable in its tactics and strategy, or motiveless in its origins. After all, by 2005 the LRA had sustained a military campaign for approaching 20 years, in an environment with little popular support (Dolan 2002; Olsen 2007). This was achieved despite significant military pressure from the Ugandan, South

Sudanese, and Congolese armed forces working with international assistance. Throughout the period up to the mid-2000s the LRA remained able to destabilise large areas of Uganda, and to retaliate when attacked.

Similarly, when patterns of LRA abduction are analysed they do not reveal inexplicable acts, but a strategic and rational (if cruel) approach based on the LRA's requirements and the gender and age of the abductees (Blattman and Annan 2010: 154-155). Large-scale atrocities at a national level may have served to indicate the LRA's potency and ability to destabilise a region. They were clearly used to punish communities or individuals for acquiescing with government instructions, while locally they could also have served to seal abductees into the bush, believing that their own crimes made their individual return to the civilian life impossible.

In relation to its origins, others have documented evidence of the LRA's political agenda in the aftermath of the NRA's successful war in the 1980s. However, the LRA's identification of political grievances, such as the marginalisation of the North, extended into this century (Finnström 2008: 120-127; Schomerus 2010; Dolan 2011: 83-85).

To acknowledge that the LRA has or has had a political agenda does not of course demonstrate that it can make a legitimate claim to represent its purported constituency. Through their practice of massacres, mutilation and brutality they have placed themselves beyond legitimate claims as representatives, while the political grievances of the north have remained. But an understanding that Kony feels or felt himself left 'holding the tail of the lion', as he has expressed on local radio, abandoned by his supporters in a campaign against Government repression, is significant and relevant (Finnström 2006b: 210-211; Finnström 2008: 99-130, 214-217; Branch 2010a; Dolan 2011: 83-92).

4.3.2 Ugandan military spending

Mwenda documents that defence spending by the Government, during a period of greatly increasing international donor support, rose from 42 million US dollars in 1992 to 88 million four years later, and then 110 million in 2001, 200 million in 2004 and 260 million US dollars in 2010 (ICG 2004: 12; Mwenda 2010: 51). As outlined above, between 1996 and 2004 the Acholi population was displaced to the camps, supposedly to clear the countryside for military engagement, and Operation Iron Fist was launched at a time when the UPDF was withdrawing from the DRC. Setting aside exchange rate fluctuations this marks a period of greatly increased spending on the UPDF, and intensifying military engagement with the LRA and the community. Yet during this escalation, LRA numbers, though hard to pin down and harder to compare given their exclusion or inclusion of dependents, do not show a clear trend, at least until 2004. Estimates from various sources have been compiled as follows: 3,000-4,000 combatants in 1997; 1,000-1,100 in 2001; 2,000 in 2002; 2,000-3,000 fighters in 2002; and roughly 3,000 total in 2004 (Gersony 1997; Weeks 2002; ICG 2004: 5; Dolan 2011: 74). Given the significant efforts to debilitate it, the group appeared to be rather resilient. This might be explained to a significant degree by its ability to abduct thousands per year, and the absence of effective measures to address the practice, let alone prevent it. Figures from UNOCHA in 2004 indicate that the LRA abducted 3,000 in the year to October 2004, bringing the total abducted to 21,000 (UNOCHA 2004: 1).

The dramatic increase in Ugandan military spending had apparently not yet resulted in a comparable change in fortunes for the LRA. By late 2004 it may be that the dynamic new context of the war was changing this balance, and this is discussed in 6.2 in more detail.

4.3.3 UPDF measures of success

One result of the LRA's requirement to sustain its numbers, its inability to recruit voluntarily, and the ease with which it was able to abduct, was that most of its numbers were abductees. Some have suggested that the proportion of abductees within the LRA ranks is as high as 90% or even more, and characterised all these abductees as children. Such claims and generalities are not always well referenced, and may owe something to the requirements of strong and clear advocacy messaging (Allen 2006b: 63).[22] Research indicates that abduction by the LRA included adults and children for the short-term carrying of loot, often followed by release (UNOCHA 2003; Allen 2005; Allen 2006b: 60-71). However, abduction for longer periods was more often associated with those under 18. Additionally, as some abductees could remain in the bush for many years, some abducted as youths became adults within the LRA, and thus the characterisation of an 'army of abducted children' needs some qualification. As suggested in 4.1.7, while the exact proportion of abductees within the LRA is not known, conservative estimates suggested a figure of around 80% (Blattman and Annan 2010).[23]

With this in mind, the means by which success was measured by the UPDF is significant. The UPDF has consistently reported its progress in terms of numbers of LRA 'combatants' killed, or the small numbers of LRA remaining (New Vision 2002; Ojwee 2002b; Ojwee and Moro 2002; ICG 2004: 14; Rodriguez Soto 2009: p161). This makes perfect sense provided one regards all LRA members as simply a military opponent. With roughly 80% of the LRA being abductees, this measure is a clear illustration that the UPDF's military campaign was not seeking to serve the interests of the affected population. Any

[22] Allen refers to a press release issued by the ICC in 2004. This appears to have been removed from their web site. The ICC analysis paper on the Northern Uganda situation has also been removed from their site. My requests for information concerning the ICC's analysis of the LRA conflict prior to its warrants have not elicited any responses.

[23] Given the length of the war, other children and potential fighters in the LRA were born there, and may have no wider conception of their wider circumstance. The degree of culpability of many within the LRA for their crimes is complex.

military engagement intended to benefit a community would not assess its success by the number of abducted members of that population it had managed to kill, and how few of those who had been abducted remained alive.

4.3.4 The conflict dynamics—a cycle of abduction and killing

Elements of the case study described so far can now be brought together to illustrate the central military dynamic of the conflict. Although this analysis is based upon largely uncontested material, the clarification of the conflict dynamic that naturally arises from it is routinely omitted from the official discourse (and the literature more generally).

In the context of the LRA sustaining its numbers through abduction (acknowledging the complexities implied by that term), claims by the UPDF of its success in killing combatants were often greeted on the ground with dismay. The notion that this was linked to a reduction in LRA numbers was generally met with scepticism.[24] This was because, as explained in 4.1.7, 4.1.9 and 4.3.2, the LRA had for the preceding decade or two been able to abduct hundreds, sometimes thousands of replacements largely unhindered by UPDF interference. Higher LRA death rates simply indicated a faster death rate amongst abductees, necessitating a faster rate of (unimpeded) abduction, and had little if any impact on overall LRA numbers. This much could be observed from the data for the decade up to 2004.

Work by Blattman and Annan (2010) has helped to quantify this phenomenon, and while it is appropriate to express caution in relation to the general applicability of the quantification from a single study, its findings match the

[24] Reading the Ugandan press between 2000 and 2006 I observed that the capture or killing of LRA members was frequently poorly reported. Firstly repeated reporting of the same event gave the perception of multiple incidents, while consistently hubristic accounts of the LRA's debilitation and imminent demise proved inaccurate. The identification of LRA members returning alive was frequently presented as the rescue of abductees, while those who were killed were identified as combatants. Rodrigues (2009) gives multiple examples of these practices in his account.

broad community experience substantiated thus far. Blattman and Annan's study indicates that in their sample, 80 per cent of those who were abducted did return. Their analysis revealed the fate of abductees as follows: of the overall total, 64 per cent escaped, 20 per cent died (or in a minority of cases remained alive in the LRA), 12 per cent were released by the LRA, and 4 per cent were captured by the UPDF. It is clear then that the principal action reducing LRA numbers was escape; death from any cause but including UPDF action was a second but far less frequent outcome; while the outcomes one might hope for if the militarised factions were concerned with community welfare—release by the LRA or capture by the UPDF—were the least likely scenarios (Blattman and Annan 2010). These dynamics are expressed in Figure 1.

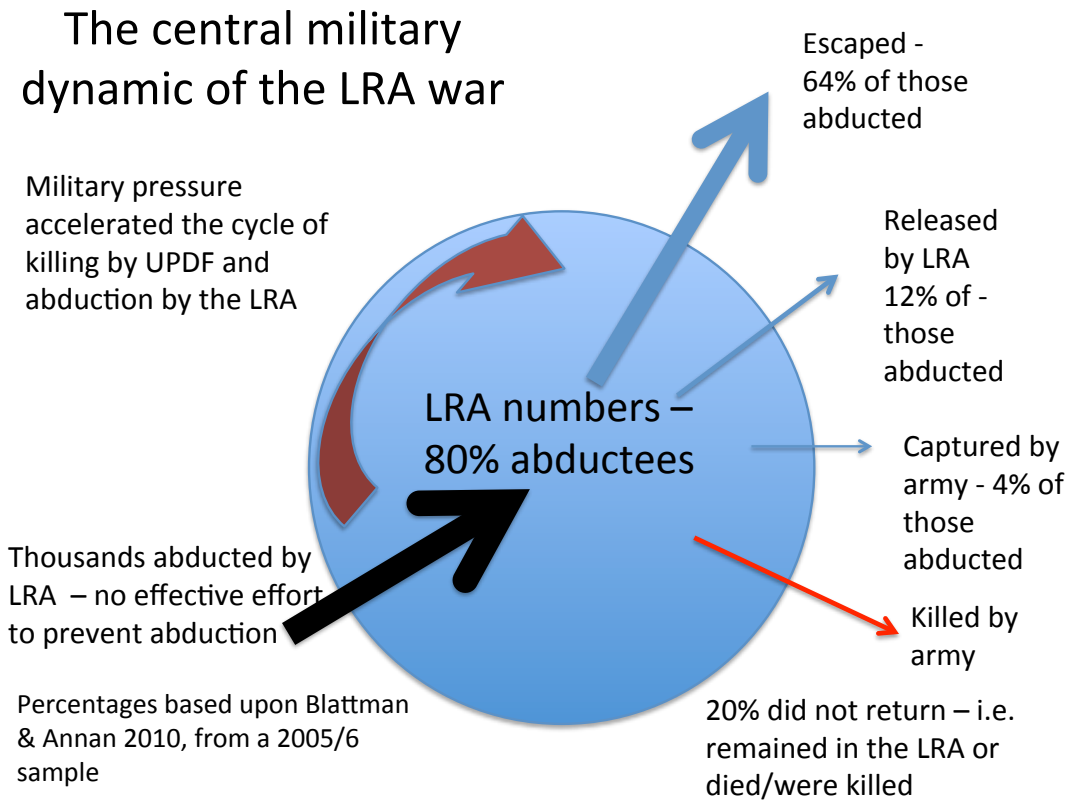

Figure 1. The central military dynamic of the LRA war

There had for the preceding decade been a well established and devastating dynamic between the LRA and UPDF in which civilians suffered at the hands of both parties. The LRA with Sudanese support was able to abduct children and adults and sustain its numbers; the UPDF, with international backing principally from the US, sought to kill LRA fighters (often the abductees) as enemy combatants. These forces were in balance for the previous decade or more: the LRA able to capture and train fresh abductees to make up for its overall losses (by all means) faster than the UPDF was able to kill them. Both sides were able to increase the intensity of this violence by launching offensives, Operation Iron Fist and the LRA reprisals being notable examples. Offensives had thus promoted the rate of killing and abduction, without decisively affecting the dynamic. UPDF violence never succeeded *in killing enough of the LRA (the abductees) quickly enough to deliver a decisive blow*; and with abduction unhindered, the LRA had always been capable of replenishing its numbers forcibly from the civilian population. This cycle in which the population was trapped, being abducted by one side only to be killed by the other was, after displacement to the camps, the second key element of the war. It is also largely absent from the mainstream accounts, one International Crisis Group (ICG) paper being a notable exception, where it is briefly articulated (2004: 14). These figures are in broad agreement with a local study by the religious leaders and others at this time (ARLPI et al. 2003).

As one would expect, civilian proposals to establish a route out of this impasse involved neither intensifying the violence against themselves, nor killing their abducted relatives. Their approach reflected their experience of the conflict, observing that escape was the main means by which LRA numbers were reduced. Blattman and Annan's findings that return was the principal route out of the LRA, broadly similar to estimates reported by Dolan, provide a compelling rationale for community supported civil society approaches to addressing the conflict (Dolan 2002; ARLPI et al. 2003; Blattman and Annan 2010).

In addressing the conflict through community-based non-violent means there were considerable obstacles to overcome, not least the spending preferences of

the Ugandan Government and international donors. The escalation in funding available for the UPDF has already been outlined in 4.3.2. Figures from the Ministry of Finance, quoted by the International Crisis Group in 2004 indicate a Ugandan defence budget of over US$200m, from a national budget of US$1.52bn. The war in northern Uganda would undoubtedly have represented a significant proportion of defence spending (ICG 2004: 12). Meanwhile the most prominent organisations promoting return included ARLPI and the Justice and Peace Commission of Gulu Archdiocese, operating with a small number of dedicated staff and local volunteers out of tiny offices, and using for the most part bicycles and a few vehicles (including this researcher's), that were often borrowed or time-shared with other projects. Their annual budgets were broadly in the region of US$100,000, and often much less.[25] Although local efforts to promote and support the escape of abductees (to be described below) were largely un-resourced, escape was far more successful a means of reducing LRA numbers than all other processes put together. In contrast, evidence of escape being significantly associated with UPDF military engagement is largely lacking. Local research in 2002 suggested that 6% of returnees escaped during a military attack, though it is not known how many deaths these attacks were associated with (ARLPI et al. 2003: 13). Starkly put, the evidence that is available seems to suggest that it was hundreds of times cheaper to get an abductee out of the LRA alive than dead. The affected communities presented an alternative approach to ending the war. This is the focus of the next section.

4.4 Civil society activism in a three-sided conflict (2000-2006)

Based on this discussion, it is clearly unhelpful to characterise the war as between adversaries on behalf of the civilian population (the UPDF) and against it (the LRA). This description is incomplete in its understanding of the origins and behaviour of the LRA; and it does not help us understand the UPDF's

[25] From 2000 and 2006 I was involved with assisting local peace organisations including ARLPI and others secure and manage funding for their programmes.

actions in seeking to control or punish, rather than protect, civilians. It is also mistaken in its portrayal of only two active sides in the conflict with opposing, principally military, visions for its conclusion. Supported by civil society actors, the role of the civilian population was not simply as victims of both sides, but as constructively engaged in generating a different vision for how the conflict might be ended, and furthering the means to do so (Armstrong 2010).

The systematic military abuses by both sides against the civilian population have been widely observed, and even on that basis alone one could argue that the term 'three-sided conflict' is clearly applicable to the LRA war. The following section goes further, and illustrates not only the separate interests of each group, but also their distinct strategies for engagement and ending the war - the two being military and the third being a civil course of action. The status of protagonist in a conflict is often conferred through their use of violence. By contrast in this case it is appropriate that the community facilitated by key civil society institutions be recognised as the third party, with distinct and different interests, strategy and engagement in this war. The 'three-sided' term is not intended to preclude the possibility of further actors, nor to obscure the diversity of views present in each party. It denotes agency and a degree of common purpose or coherent action, which in the civil case alone was non-violent (Branch 2005).

4.4.1 Civilian peace activism

Diverse approaches to justice in Africa have already been noted, in relation to the discussion of fundamental justice concepts (1.2.4). In northern Uganda, community efforts supported by key civil society actors for peace and justice rested upon a holistic understanding of justice concepts, encompassing deontological and consequentialist themes, and restorative as well as retributive processes. Grievances underpinning the conflict had their roots in the divisive colonial and post-colonial settlements, and reparative and redistributive notions. Through the suffering imposed upon the population by the camps and the

conflict dynamic these concerns were heightened. Communities deprived of necessities of life such as food and clean water, their homes, livelihoods, and security for remaining family members, perceived justice remedies far more immediate and profound than retribution. In the first instance they sought food, and peace, which represented the possibility of the restoration of the necessities of life (Pham et al. 2005: 4).

In pursuit of these goals, restorative approaches to justice with these consequentialist priorities were emphasised, as they have been elsewhere in Africa (see 1.2.4). Pain's work in the 1990s was prominent in promoting traditional leaders' use of reconciliation mechanisms to foster restorative justice approaches to addressing the conflict (Pain 1997). Local traditional justice mechanisms, including *mato oput*, *tong gweno,* and *gomo tong* emphasised restorative means to achieve *roco wat*—the restoration of relationships (Baines 2007).

Such approaches have been thoroughly researched and critiqued, in relation to their suitability for the purpose. Doubts have been articulated over whether mato oput, for example, as an inter-clan mechanism for conflict resolution and the restoration of relationships, could ever adequately resolve what was undoubtedly a much broader and more serious issue. Equally, an erosion of the authority of male elders over the decades of war had taken place. The corresponding emphasis placed by Pain on the reinstatement of their authority in order that they might address the national and internal Acholi turmoil might be unrealistic, or counterproductive. The social order that the male elders represent upheld systems of power and privilege that were to some degree entangled with the political origins of the war itself. Some have suggested that the crisis of Acholi society that the war represented may have been an opportunity for social reform. By contrast, the intervention of external agencies in support of their re-imposition (or indeed invention and imposition), might simply be a further imposition that would restrict local political agency. Of less relevance perhaps than their utility, were claims that reconciliation practices

were or were not authentic (Dolan 2000a; Allen 2005: 65; Allen 2006b; Finnström 2008: 197-232; Allen 2010; Branch 2011: 154-178).

Many of these criticisms and concerns have merit. The circumstances of existential crisis and catastrophic violence facing the Acholi people may have presented an opportunity for progressive social reform. However, the priorities voiced by people were primarily for food and peace, and not the restructuring of Acholi social systems. The male-led religious and traditional leaderships, which were thrust to the fore by the circumstance of the war, and doubtless used external interventions to entrench their power in some instances, were also seeking to address the issues of most profound concern to their communities, and engaged in securing the return of LRA abductees from the bush alive. The transient external support for these institutions from NGOs and others, which were in all probability associated with some social ills, were aligned with a locally conceived and led non-violent strategy to change the strategic course of the conflict. The work of the religious and traditional leaders in campaigning for and securing the Amnesty Law in 2000, for example, reflected a consequentialist approach to justice, prioritising what communities demanded most urgently (ARLPI and JPC 2001; ARLPI et al. 2003; ARLPI 2004).

Despite the work of Dolan, Branch, Rodriguez and others, community-backed civil society efforts to end the conflict have too often been marginalised or omitted in mainstream accounts of the war, and military efforts to end the conflict have eclipsed non-violent initiatives (Rodriguez 2004a; Branch 2005; Dolan 2005; Rodriguez Soto 2009; Branch 2010a; Dolan 2011). As is demonstrated elsewhere (forthcoming article under revision prior to resubmission), the civilian population has even been mistakenly characterised in the literature principally as victims whose efforts to end the war had failed, and who were awaiting rescue (Akhavan 2005). This does not reflect the depth and breadth of civil activity that took place, and the extent to which it provided an alternative approach to resolving the conflict, opposed to violent LRA and government strategies. Nor does it acknowledge the many victims of the violence who heeded the calls for restraint in dealing with those who had

wronged them, subordinated their desire for revenge and recrimination, or participated in activities to promote peace and restore relationships, in many cases at great personal cost or risk to themselves.[26]

The civilian response to the conflict can be seen as shaped by their experience of abduction and atrocities, killings by both sides, displacement and impoverishment over the preceding decades. Civil society efforts focused on seeking to end these dynamics: community-based research that highlighted the civilian experience of the war; prevention of abduction, and the return of abductees alive, free from the fear of prosecution by the authorities; forgiveness and reintegration of former combatants; contacts with the LRA that might turn the return process into a powerful dynamic that could help to end the conflict; respect for human rights and the rule of law, as opposed to the use of violence by either side; an end to confinement in the camps; and the chance to return to their homes, land and livelihoods. Accepting individuals' desire for revenge, the civilian population by 2000 longed for an end to the war—and to the abduction, killings, atrocities and displacement, that continued to affect them so severely (Branch 2004: 17; Branch 2005; Pham et al. 2005; Worden 2008: 4; Rodriguez Soto 2009). This desire for peace is overwhelmingly reflected in the activities of civilian actors (ARLPI and JPC 2001; HURIFO 2002; ARLPI et al. 2003; ARLPI 2004). Restorative justice measures were a strategic response by the community that presented the possibility of securing peace; it was one which did not require the violence against the civilians that was generally associated with military efforts.

[26] Travelling and working with civil society leaders I observed widespread and popularly supported calls for peace through return of combatants to the civilian life, and heard descriptions from returnees of their fear of reprisals from community members. I also received accounts of terrible acts of revenge, and others of enormous compassion or great tolerance.

4.4.2 Community-based research

In developing an understanding of the conflict informed by the population, organisations like the Agency for Co-operation and Research in Development (ACORD) which supported Dolan's research, HURIFO, ALRPI and JPC were prominent. Each was active in research that highlighted aspects of the conflict, and each is referenced in this chapter. A key strength of their approach was their data collected from the war-affected population and accompanying analysis. Equally important was their close engagement with victims of the violence through multiple initiatives to support their interests. This close community link and constancy of presence during the war resulted in in-depth understanding, and explains in part the congruence of their analyses.

This congruence extended to shared understanding of the experience of civilians, role and conduct of the UPDF, obstruction of civil society peace efforts by the government, and the brutal creation and devastating impact of the camps. The publications *Let My People Go* (ARLPI and JPC 2001), *Between Two Fires* (HURIFO 2002), and *Seventy Times Seven* (ARLPI et al. 2003) were particularly important in emphasising people's demand to be released from the camps, for human rights to be respected by both sides, and for implementation of the Amnesty Law. *Justice and Peace News*, the monthly JPC newsletter that was the only regular publication about the war from within the war-affected area, was published in two languages in print and email, and was widely circulated nationally and internationally. It provided a chronology of events compiled from reports from the ground that was in sharp contrast to accounts in the government controlled New Vision newspaper. Between 2001 and 2002 the ARLPI web site www.acholpeace.org (now closed) disseminated reports from communities of violent incidents, often on the day the news reached the religious leaders (the author was managing this site at the time). These aspects of the war—ones that are informed by people's experience of it—are central to an accurate understanding of what took place. They indicate a profoundly different understanding to the binary and military-focused account of the conflict that has commonly circulated in the media and internationally.

4.4.3 Return and amnesty

The experience of abduction, particularly of girls from St. Mary's College, Aboke in 1996, led Angelina Atyam and other parents to form the Concerned Parents Association (CPA), a group of parents of those who had been abducted.[27] The emphasis of this group's activities was on advocacy for the prevention of abduction and the return of the abductees alive. Their local, national and international work was significant in raising the profile of the conflict.

The issue of the return of abductees, as opposed to their being killed in combat as LRA members, or punished for their crimes following their return by military, community members, or legal authorities (Finnström 2008: for example 9), also underpinned the work of ALRPI, JPC and others. In campaigning for an Amnesty Law they sought to give abductees a right to return from the bush without fear of legal redress for their crimes. Against determined opposition from the government, and President Museveni in particular who initially opposed the move (Odong 2002; Allen 2005: 21,32-33; Pham et al. 2005: 49), this civil society campaign gained support from the international community and was in the end successful in securing the Amnesty Act at the end of 1999 (Dolan 2011: 51).

Painstaking work over the following years sought to establish this route out of the LRA, for the abductees and any who would renounce rebellion, as a reality on the ground. Even after the passing of the Amnesty Act, the government's obstructionism continued (Pham et al. 2005: 49).[28] The Commission was not

[27] The author worked with Godfrey Orac, co-ordinator of the Gulu office of CPA from 2000-2003, and have remained in contact with him. Accounts of the conflict from the perspective of parents of the abductees, as well as witnessing Angelina's passionate advocacy for the return of abductees and the protection of Acholi children from abduction, deepened my understanding of the conflict dynamic. From 2000-2002 I also worked to support the development of a vocational school which sought to give former abductees skills and help returnees reintegrate into civilian life.

[28] Notwithstanding the grave concerns about the methodology used in this population-based survey, discussed in section 6.2.2.

properly resourced and was extremely slow to get off the ground (Dolan 2011: 99-100). It was not until 2001 that the first Amnesty Commission offices in Gulu and Kitgum, funded by the European Union, were tasked with the process of issuing amnesty certificates to returnees. In the period from 2000-2003/4 political foot-dragging by the government was complemented by UPDF obstruction of communication with the LRA groups seeking to return (Pham et al. 2005: 46-49; Rodriguez Soto 2009; Dolan 2011: 53). The lack of respect for the law shown by the UPDF, such as the prison storming, executions, and killing of the occasional returnee by the army, may also have served to discourage the process.

By contrast, local NGOs aided by some international partners supported this process, disseminating information about the amnesty on the ground through local networks, by using leaflets, radio stations in Gulu and Juba particularly, and other means. The amnesty was popular on the ground and local groups were active in this work, using songs and dances to further spread the message (Lomo and Hovil 2004: 6, 60-65). ARLPI, JPC and others established a network of Peace Committees throughout the Acholi region in almost every displaced people's camp, and facilitated them to promote the possibility of amnesty, return, and reintegration. Persuading young people, and others, that return was an option should they be abducted was one element; however, reaching those within the LRA and overcoming their mistrust (and LRA disinformation) was a significant challenge. This intensive work commenced between 2001 and 2002.

In addition to Government obstructionism, and consistent with an understanding of the conflict as three-sided, the LRA also made significant efforts to counter the amnesty message: radios were confiscated, available only to more senior commanders; and abductees were taken north into Sudan, far from opportunities to escape. There they could be held for years before being selected to return to Uganda as LRA combatants. There are also accounts of groups of abductees being forced by the LRA to witness the brutal torture and killing of those who had unsuccessfully sought to escape. This was done as an

example and warning to others. Some interviews with escapees indicate that they had little expectation that they would survive their effort to return, fearing death at the hands of other LRA members, the military (perceiving them to be active LRA members), or communities seeking revenge (Allen 2006b: 75; CR and QPSW 2006; Blattman and Annan 2010: 140-143).[29] The LRA continues to abduct hundreds of people each year (HRW 2010b: 39; Invisible Children 2014).

Despite Government ambivalence and LRA opposition, 4,000-5,000 or more LRA members had returned and applied for amnesty by 2004 (Allen 2006b: 75; Dolan 2011: 100). This figure is a fraction of the total number of returnees; indeed, local research compiled in mid-2002 found that only 1.6% of their sample of returnees had received amnesty packages, and fewer still amnesty certificates (ARLPI et al. 2003: 15-16)[30]. It is surprising then that effectiveness of the return process overall is often crudely and inaccurately equated with that of the institutionalised amnesty and resettlement numbers, which grew considerably between 2002 and 2006. Official figures tended to significantly underestimate the number of returnees. This further highlights the effectiveness of securing the return of the abductees alive as a means to reduce LRA numbers, as opposed to killing them (ibid).

Allen suggests that the increase in return rate of LRA abductees from 2002 may have been in part due to UPDF activity in Sudan, as well as radio broadcasts.

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[29] These observations were in accounts by returnees given to me at the time. I was one of the team that developed the Conciliation Resources 'Coming Home' report, my role encompassing formulation of the original concept, and collaboration in all aspects of the research, its dissemination, and application. Through interviews with returnees from the LRA the work identified why abductees remained in the LRA, what facilitated their choice to leave, how they escaped. It was formulated with the local peace organisations involved in promoting return and amnesty, and was primarily used to strengthen their strategies for fostering peace in Uganda, and Sudan. Published by Conciliation Resources, it was a collaboration between Ugandan and UK peace organisations.

[30] By mid-2002 the amnesty process was starting to gain momentum. However, before that time this local research revealed that a considerable proportion of returnees went directly back to their villages, avoiding both the amnesty process and the support programmes run by NGOs.

However, the civil processes encouraging return in Uganda, actively promoted by local leaders and linked to the use of radio messaging, seems to provide a more powerful explanation. First, unlike the UPDF's war in Sudan, the civil society return process took place in Uganda where return was accelerating.[31] LRA commanders were starting to come out of the bush with their fighters, through local Church contacts, as early as March 2001. This was a year before the UPDF entered Sudan with Operation Iron Fist (Allen 2006b: 75; Rodriguez Soto 2009: 8-18). Additionally, though continuing to operate in Uganda, the LRA's movement of its bases into southern Sudan from the late 1990s or early 2000s may have been a response to the need to prevent escape and the return of fighters to the community. We know from accounts on the ground at the time, figures compiled about the amnesty process, and academic studies that, the return process was a much greater cause of loss to the LRA than death or capture by the military, this seems a more plausible explanation (Rodriguez Soto 2009, Blattman and Annan 2010, Dolan 2011). Despite the likelihood that this more impactful process could have had the greater influence, this possibility is not mentioned in the literature. All accounts that the researcher has encountered suggest military pressure was principally responsible, without discussion (Etengu 2001; Ojwee 2002a; ICG 2004: 7-8; Akhavan 2005; HRW 2011b: 29). In so far as reduction in LRA numbers played a part, the belief that the Ugandan military were responsible for prompting the LRA's move to Sudan is founded upon an assumption: that the approach with considerably less impact on LRA numbers was by far the most influential. This unsupported belief in military efficacy, contrary to evidence, is deployed as the foundation for a further claim, to be examined in the next chapter.

4.4.4 Toleration and reintegration

In addition to securing the Amnesty Law, seeking its effective implementation, and facilitating practical means of return for those in the bush, community

[31] Informed by the Ugandan civil society strategy to achieve peace through the return process, I worked on the ground intermittently in South Sudan seeking to support the development of additional local radio messaging in 2005 and 2006.

leaders were active in nurturing the civil society willingness to receive and accept the returnees. ARLPI and JPC organised New Year peace rallies, public meetings, peace prayers and remembrance events (sometimes directly following atrocities) calling for an end to the violence and for the respect of human rights, but also for return of abductees and their acceptance and reintegration. Religious leaders instructed and implored communities to forgive those who had wronged them, and reminded them that their own children who had been abducted would also require such forgiveness in order to return. Though Allen has pointed out that the Acholi capacity to forgive has often been exaggerated, this advice was part of an effort to create an environment to which abductees could return—one in which, if they were not universally forgiven or even accepted, they were at least tolerated and could achieve some level of personal security (Allen 2006b: 128-131).

Such efforts complemented other work by civil society groups, promoting reconciliation and reintegration. The activities of the Rwodi (traditional chiefs), and their NGO Ker Kwaro Acholi were prominent and significant. The informed critiques of these processes have been indicated (4.4.1), but nonetheless they were a significant aspect of civil society peacebuilding associated with the strategic practice of supporting reconciliation and promoting the return and acceptance of abductees. As an element of the civil peacebuilding strategy, there is some clear evidence of their effectiveness (Binomugisha 2010).

Established and relatively well resourced Ugandan NGOs such as Gulu Support the Children Organisation (GUSCO) and Kitgum Concerned Women's Association (KICWA) were instrumental in providing returnees with accommodation and psychosocial support following their return, and supporting reunion with their families or otherwise being returned to the community. Thousands of returnees passed through their facilities on their route back from the LRA (HURIFO 2002; ARLPI et al. 2003; UNOCHA 2004).

Other civil society efforts complemented this work, and at a local level there were numerous small-scale self-help initiatives or small business set up by

those who had returned, Kica Ber being one example in Gulu. Projects also offered vocational training to returnees and others, including Gulu Community Vocational School (GCVS), St. Monica's tailoring and vocational school, and others. These efforts may not always have been well integrated with all other efforts, and were in most cases greatly under-resourced; however, they represent further civil society engagement in supporting return, resettlement and reintegration.

4.4.5 Contact and mediation

ARLPI and JPC also carried out a significant amount of work encouraging reconciliation at the local level throughout this period, including between the Acholi and neighbouring tribes. The Peace Committees already mentioned (4.4.3) were able to act as a bridge between the religious leaders and local officials who in many cases were amongst their members. They in their turn were able to be contact points for aspiring LRA returnees, facilitating their safe emergence from the bush. But this network's activities were not confined to assisting the return of individuals. The religious leaders had begun to engage active LRA commanders in the bush in dialogue. By promoting the possibility of amnesty they facilitated the return of commanders, together with those under their command. The return of Onekomon Kikoco from Sudan with a group of twelve (formerly abducted) fighters in March 2001 was perhaps the first prominent example. As attested earlier, the religious leaders were consistent throughout this period and up to the present, in advocating dialogue and rehabilitation over violent military enforcement and retribution, as the means to bring peace (Rodriguez Soto 2009: 1-18; ARLPI 2013).

Due to the violent and unpredictable behaviour of the LRA such efforts were of course extremely risky, and the possibility of disruption and sabotage of this process by the government/UPDF increased these dangers. These activities, and efforts to obstruct them, have been described in some detail by Rodriguez, though their potential to alter the dynamics of the conflict, particularly if they had

been adequately resourced and enabled, has been otherwise neglected in the literature. From 2002, increasing numbers were returning. Initially through the release of women and children to local religious leaders, groups of 31 and 94 had returned in mid-2002. By 2003 contacts with LRA commanders became more frequent (Rodriguez Soto 2009). Through multiple escape, return or release processes, by individuals and groups, through unofficial and sometimes official channels, by December 2005 statistics from the Amnesty Commission indicated that more than 10,000 had received their amnesty certificates in the Acholi region (Rodriguez Soto 2009: 39). This number is of course much larger than the estimates of LRA 'fighters' remaining in the bush, which as we have seen rarely numbered more than 3,000. Although complicated by numerous factors, including time in the bush and verifiability of return, this nevertheless represented a strategic shift in the dynamic of the war by any measure.

These local efforts—promoting an understanding of the conflict based on the community's experience; calling for release of the population from the camps; enabling contact, mediation and return from the LRA with amnesty for the abductees; and a measure of tolerance and reintegration—can therefore be seen to form a coherent alternative non-violent approach to addressing the conflict and ending the war. It was one that by 2005 was achieving considerable success. With the possibility that the third side in the war might secure its objectives and end the conflict in a manner consistent with its own interests, it is perhaps not surprising that it was obstructed by the Government and opposed by the LRA.

4.4.6 Civilian peace activism—the third way

The essential point emerging from this section is that civilian efforts to end the war were significant, and in sharp contrast to the violent approaches emphasised by the other two sides. Informed by a strong analysis of the conflict, from the perspective of those communities who were victims of it, they were strategic, and effective measures were being implemented despite hugely

inadequate resources. This is not to say that they were always successful, or well co-ordinated and executed, but they were a practical alternative for how peace and justice could be attained without killing the abductees, and by 2004 this civil society approach was having a significant impact (CSOPNU 2007).

Local approaches to attaining peace and justice were thus characterised by the following:

1. Broad-based plans developed and activities implemented by communities affected by the violence across the region, by community leaders, whether from religious denominations, traditional leaders, or community-based projects and organisations for the promotion of human rights.
2. Rejection of the violence of both armed groups and prioritisation of the interests of communities affected by the violence, rather than primacy being given to one aspect of a larger national or international political or military strategy.
3. A non-violent strategy for peace specific to that conflict, and rooted in the experience of its dynamics, that promoted a return process for abductees/rebels, founded upon the principle that they should renounce rebellion, return and claim amnesty. This was complemented by leaders' widespread engagement with communities to receive and tolerate or support returnees, and their on-the-ground negotiations with rebel groups to secure their participation.
4. A demand that people should be allowed to return from the camps to their homes immediately according to their wish, in accordance with international law as a restoration of their human rights.
5. A broad view of justice that sprang from the recognition of many decades of injustice, which saw the cessation of violence and the rebuilding of relationships as central. It included within it the human rights of the affected civilians, including the abductees. This contrasted markedly with others' approaches that proposed the extension of retributive approaches, focused on a narrow view of justice to address specific grievances, and sought its achievement through violence.

4.5 Other avenues to peace (2004-2010)

> March 2004 operation Iron Fist 2 was launched, and military efforts to defeat the LRA in southern Sudan were redoubled. However, as previously described, the LRA was by now considerably weakened by the Ugandan return process, which was gaining momentum. The way was cleared for almost all LRA members to return to civilian life, under the legal protection of the Amnesty Law, and with increasing contacts making this possible there was optimism in northern Uganda that the conflict might end (UNOCHA 2004: 1).

By May 2004 Bigombe had once again become involved, moving between Kampala, Juba, Gulu and other more remote destinations in order to communicate with LRA negotiators. In November that year she was able to secure a seven-day cessation of UPDF military operations to facilitate contacts, and contacts had intensified by the year end with another truce. Further talks continued into 2005, with a longer ceasefire in February (Rodriguez Soto 2009: 230-246). However, this promising momentum was not sustained. Two LRA commanders, Onen Kamdulu and Sam Kolo (who had a prominent role in the negotiation process on the LRA side), defected from the LRA (Allen and Vlassenroot 2010: 17), and amidst warnings from Bigombe that ICC warrants could threaten the talks (ICG 2005a; ICG 2005b; ICG 2005c: 5), security deteriorated and the war resumed (UNOCHA 2005b). Significant efforts by Bigombe continued through much of 2005, though her contacts with LRA representatives were intermittently obstructed by the UPDF (Rodriguez Soto 2009: 246). The Bigombe process was to close later that year, under circumstances to be discussed later in this thesis (6.3.1).

However, the opening for negotiations remained at this time, presented by the difficult situation for the LRA on the ground and further developments in Sudan. In January 2005 the Sudanese Comprehensive Peace Agreement (SCPA) was

signed in Nairobi (UN Mission in Sudan - UNMIS 2005), and SPLA forces were able to turn their attention to securing their newly defined territory. Within the year the LRA had transferred their main bases into the Democratic Republic of Congo (DRC), principally in the Garamba National Park (ICG 2006b), and face to face engagement with them was soon resumed. In May 2006 Riek Machar, South Sudan's Vice President, met with Kony in Garamba—an event that was filmed and broadcast by Reuters. Events rapidly gathered pace, and a month later the Juba talks commenced with significant international support, mediated by the Government of South Sudan and the Community of Sant'Egidio, and attended by the Ugandan Government and a delegation of LRA representatives (Rodriguez Soto 2009: 247-266). The ICC's influence on these and subsequent events will be discussed in Chapters 5 and 6.

4.6 Recent events from December 2008

While this thesis focuses upon the conflict and the intervention of the Court, primarily covering the period from 2000-2010, it is useful to outline the trajectory of the conflict from 2010 up to the present day, so that the discussion is understood in relation to later events.

On the collapse of the Juba talks in December 2008, Operation Lightning Thunder was launched by the Ugandan, South Sudanese, Congolese and Central African Republic armies against the LRA headquarters in Garamba. Following this assault, which like those before failed to deliver a knock-out blow to the group, the LRA demonstrated its continuing potency in its usual manner, by brutally massacring civilians. During the Christmas period in a series of outrages it killed well over 800 people in the DRC's Haut-Uele District (HRW 2009a). The period up to 2011 then saw the dispersal of LRA groups over a wide area, including within DRC, along the South Sudanese border, and widely into the Central African Republic (CAR). Very significant levels of LRA violence towards civilians continued, including killings and widespread abductions (HRW 2010b).

Since 2011, according to the LRA Crisis Tracker web site which seeks to compile a comprehensive record of LRA attacks over the region, activities by the group are ongoing. Their records indicate that the group has for the past six years been spread over a vast area, perhaps 1,500km by 500km, many times that of its former focus in northern Uganda and southern Sudan. It is not easy to assess how comprehensive data on their activities is, and thus what the LRA's current activities amount to, however it may be that LRA activities are taking place at a much lower level. The site records fewer than 100 killings and 650 abductions annually—a portion of the latter may of course be resolved through return (Invisible Children 2014). Displacement of populations has been recorded in DRC, particularly following the major massacres, but there is no comprehensive picture of this, and permanent mass displacement on the scale of the Ugandan experience has not been observed. Return from the LRA is reported to be a lower levels too (IRIN 2015). Clearly then, the LRA continues to have a devastating effect on civilian populations who remain largely unprotected, while the extent of the suffering caused remains unclear, partly due to the remoteness of the area. Kony of course remains at large, and the failure to pacify the group continues to have serious but hidden consequences for communities (Shepherd 2015).

In Uganda there have been no LRA attacks since the Juba talks process. People have been released from the camps and have returned to rebuild their homes and livelihoods. The LRA's activities then, far from being over, have been displaced from Uganda into much larger and more remote territories (ICG 2010).

4.7 Review

This chapter has used the available evidence to give an account of the emergence of the LRA war, and highlight aspects of the conflict that, because of their severity and widespread nature, were central to the civilian experience of

the war in the period prior to the ICC intervention. In particular these were as follows:

1. The historical and political underpinnings of the conflict, that place it within the context of inter-ethnic economic, social and political grievances, and deep animosities generated as a result of past atrocities and other wrong-doings committed by all sides.
2. The violence and brutality of both armed parties to the conflict towards the civilian population, particularly by the LRA which is guilty of many vicious attacks and atrocities.
3. The three (or more) sided nature of the conflict, in which civil society interests were not represented by either armed faction, but rather subordinated to their strategic political or military considerations.
4. The violent creation of the camps at the hands of the army and in response to LRA atrocities as central to the civilian experience of the war, and their association with extraordinary levels of suffering and most of the war-related deaths.
5. The central military dynamic of the conflict involving abduction of civilians (often children) by the LRA, and their killing by the UPDF as LRA combatants. This was a stable and central feature of the war for over a decade in the run up to, and after, the ICC intervention.
6. Civil peace activism arising from the community that through a strategic approach sought to draw the conflict to a close by non-violent means, and which despite being greatly under-resourced and often opposed by the two armed protagonists, showed significant signs of success by 2004.

The key insight and contribution in this chapter is the framing of the conflict as a three-sided war. Others have documented both Government and LRA brutality towards the civilian population (Dolan 2000b; HURIFO 2002; Dolan 2005; Finnström 2006a; Finnström 2008), and recorded the peace efforts of civil society actors (ARLPI and JPC 2001; Rodriguez 2002; ARLPI et al. 2003; Rodriguez Soto 2009). The claim for its triangular nature is established based on three observations: the widespread civilian experience of violence by both

other parties; community agency and a non-violent strategy for ending the conflict (opposed by both other sides); and distinctly different civil society objectives in the war (the return of abductees, release from the camps, and peace).

The second key understanding is related issue of the war's perception, (articulated in 4.0.1). The official discourse, though thoroughly discredited by the evidence and literature, remained prevalent nationally and internationally and was highly influential. On the basis of this view, significant elements of the international community sensed a responsibility to intervene to assist the victims (the local population), to address the mindless violence of the LRA, as if the conflict was simple, bipolar, and resolvable through military violence. Believing that the affected African population had no agency or capacity and could only occupy the role of victim, they envisaged the Ugandan government and UPDF as their proxy for intervention. This was the context prior to the ICC engagement.

Chapter 5 ICC intervention—the dominant narrative

The preceding chapter indicated some of the complexity of the conflict—its roots in a history of grievance on all sides, and the record of extreme brutality by the LRA accompanied by the displacement of the population to camps by both sides. It contrasted military efforts to prosecute the war, which had resulted in well over a decade of catastrophic stalemate for the affected population, with emerging non-violent community efforts for dialogue and the return of their relatives alive. Using both evidence from the ground and the literature, the three-sided nature of the war was clearly demonstrated.

Into this volatile environment the principled clarity of the ICC was brought to bear. Yet this clarity itself presents theoretical and practical issues, outlined in Chapter 3. An end to impunity involves a retributive approach in which enforcement (often military) is necessary. This demands political accommodation, and potentially a measure of violence itself. The application of normative standards and approaches implies a wresting of power away from the warlords, but also away from affected communities, and a belief in the efficacy of universal measures applied to diverse and complex contexts. Legal process entails a departure from consideration of context and consequences of a dispassionate application of the law (Schiff 2012).

The Court's first case was one in which the risks of potentially severe consequences for the affected population, desperate for an end to the violence, were high; but it was also a critical moment for a new institution, charged with an international mandate to end impunity for the perpetrators of the most heinous crimes. Much was at stake.

5.1 The narrative of initial intervention

The ICC's early engagement in the LRA war is well documented from authoritative institutions including the Court itself, its reports to the UN Security Council, the Ugandan Government, and legal scholars writing in highly respected academic journals. Schabas gives a succinct summary (Schabas 2006: 29-32). These sources are complemented by reports from international institutions with expertise in human rights, justice and conflict resolution such as Amnesty International, Human Rights Watch, the International Center for Transitional Justice, and the International Crisis Group. These accounts are not unanimous in every respect, but they display sufficient common elements for a shared interpretation of events to be articulated and disseminated (HRW 2005; Pham et al. 2005; AI 2006; ICG 2006b; AI 2007; ICG 2007; Pham et al. 2007; HRW 2009a; HRW 2009b; Roth 2010; Schabas 2011: 39-44). Not all other scholars concur, and quite a number differ in important respects (Dolan 2005; Rodriguez Soto 2009; Mamdani 2010; Branch 2011; Dolan 2011; Rodman and Booth 2013). However, a predominant narrative concerning the efficacy of the engagement emerged.

Chapter 5 articulates this widely promoted account: examination of the research basis upon which the narrative rests will follow later. Each section of this chapter identifies a key claim prominently asserted as part of the account. These elements are summarised at the end of the chapter, each one referenced back to the preceding section that demonstrated its place within the whole. This allows the application of evidence and analysis that commences in Chapter 6.

5.1.1 Referral, investigation, and issuing of arrest warrants

Following its creation in 2002 the Court's first Chief Prosecutor, Luis Moreno-Ocampo, was sworn in during June 2003. Within only a few months he had invited states to refer situations to him voluntarily, a strategy not originally envisaged by the drafters of the Statute, but intended to strengthen the possibility of state assistance on the ground (Ocampo 2006c: 2, 22; Schabas 2007: 9). The LRA case was prominent amongst them, and accounts indicate that Payam Akhavan,[32] whose understanding of the war has been influential, was involved in behind-the-scenes engagement with the Government of Uganda to facilitate this development (Akhavan 2005; Nouwen and Werner 2010: 947). As indicated in Chapter 3, the LRA case is likely to have presented a promising opportunity for intervention in which numerous atrocities and violent outrages against civilians were well documented, carried out by a group with little political support, and led by individuals carrying significant personal responsibility—prominent potential suspects. Ugandan Government referral of the LRA situation to the Court followed in December 2003, and the Prosecutor accepted the referral on the understanding that crimes within its jurisdiction by any party could be investigated (Ocampo 2003; Republic of Uganda 2003; AI 2004; ICC 2004a; ICC 2004b; Allen 2005: 45; Schabas 2007). He anticipated that his efforts for international criminal justice would complement the furtherance of human rights for the civilian population:

> The LRA has mainly attacked the Acholis they claim to represent. For nineteen years the people of northern Uganda have been killed, abducted, enslaved and raped […] Let me turn to the alleged crimes committed by the LRA in northern Uganda since July 2002, when the ICC jurisdiction begins. Two of the most serious types of crimes alleged in the warrants are numerous acts of murder and enslavement, both constituting war crimes and crimes against humanity[…] the killings and

[32] Payam Akhavan, Associate Professor of International Law at McGill University in Montreal, and prominent proponent of the ICC and its intervention in Uganda.

> abductions numbered in the thousands, often reaching into the hundreds within single months. (Ocampo 2005b: 1-2)

At the outset it was the intention that through the action of the Court the principal crimes of the LRA—killings, abductions and other atrocities—would be addressed.

Just as the Court's process could be enhanced by Ugandan government support, so too the Ugandan authorities may have perceived their hand strengthened and their cause legitimised by ICC involvement, holding the promise of international backing for its military effort as it did. During the following month, in January 2004, the ICC Prosecutor and President Museveni carried out a joint press conference in London to announce the ICC's involvement in the case (ICC 2004b; Allen 2005: 42; Drew 2010).

At the time this was a move criticised by some, including some supporters of the Court, as compromising the Court's independence (AI 2004; Seils and Wierda 2005: 10; Schabas 2007: 14). The Prosecutor subsequently indicated that all crimes had in fact been considered, and that only those of the LRA met the required standard of gravity:

> The criteria for selection of the first case was gravity. We analysed the gravity of all crimes in northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA. (Ocampo 2005b: 2)

In February 2004 the prominence of the case was tragically enhanced by the massacre at Barlonyo camp in Lira district, south of Kitgum. This appalling act did not go unnoticed by the Prosecutor, and an investigation by the Court was formally announced at the end of July (HRW 2005: 10; ICC 2005c; Otim and Wierda 2010: 2).

In the period that followed, the Court conducted over fifty missions to Uganda to gather evidence, and by May 2005 the Office of the Prosecutor (OTP) applied for arrest warrants to the pre-trial chamber (PTC) for five LRA commanders (Ocampo 2005b: 3). Although they were issued on 8th July by the PTC they remained sealed for security reasons. Finally the identities of the five were revealed on 13th October 2005, the Prosecutor indicating by this stage that he had been patient enough. The warrants named Joseph Kony and his deputy Vincent Otti, and commanders Raska Lukwiya, Okot Odhiambo and Dominic Ongwen (Ocampo 2006c). Perhaps anticipating their relatively rapid apprehension, notwithstanding the near 20-year history of the war, the Prosecutor stated:

> The next step is arrest. Arrest warrants of the ICC will help galvanize international efforts to apprehend the suspects. The responsibility to execute the arrests is a responsibility of States Parties and the international community. Reports indicate that the fugitives are moving between three countries: Uganda, DRC and the Sudan. These countries must work together, with the support of the international community, to carry out the arrests. (Ocampo 2005b: 7)

The means by which the persistent course of the war could be altered and arrests thus achieved were not elaborated upon, but at the press conference on the same day Ocampo indicated his belief that 'justice efforts will help to integrate military and dialogue efforts to protect people' (Ocampo 2005a). These moves signalled collaboration between the Court and the Ugandan State, alongside other regional powers, with a view to the military apprehension of the LRA leadership (Ocampo 2010a).

5.1.2 Intervention on behalf of the abducted children and their communities

If enforcement of the ICC's warrants on the ground was anticipated to be military, a central motivation of the Prosecutor was undoubtedly humanitarian. The ICC envisages its interventions as of benefit to communities affected by atrocities, and as the Prosecutor has come to articulate it, 'victims have been the drivers and the pushers of the Court. We are their Court' (Ocampo 2010a: 11). This was the case from the outset, when the Prosecutor viewed his intervention as associated with the interests of the abducted children and the affected communities, as the following statements demonstrate:

> Jan Egeland of the United Nations has called the situation in northern Uganda 'the biggest forgotten, neglected humanitarian emergency in the world today.' Almost fifty per cent of the civilian population of northern Uganda have lost their freedom and now live in camps for internally displaced persons. In this context our mandate is to investigate and prosecute those who bear the greatest responsibility. We found evidence of crimes against humanity and war crimes […]
>
> The International Criminal Court was established to demonstrate the determination of the international community to put an end to impunity for the perpetrators of the most serious crimes. Civilians in northern Uganda have been living in a nightmare of brutality and violence for more than nineteen years. I believe that, working together, we will help bring justice, peace and security for the people of northern Uganda. (Ocampo 2005b: 1-2, 7)

Ocampo was intervening on the basis of the overarching mandate conferred by the Court's Statute to extend the rule of international criminal law; anticipating the association of this purpose with context-specific objectives relating to the interests of victims. The Prosecutor was expecting that his actions would

contribute to an end to the violence, and the reconciliation of communities. He also perceived the interests of the Court, the community, and the Ugandan Government and military as being aligned. This view was internationally widespread at the time, and proponents of international criminal justice outside Uganda anticipated military enforcement (AI 2002b: 97-131; HRW 2002b; AI 2004; HRW 2005; AI 2006; HRW 2009b; Mendes 2010). One advocate for the ICC observed that 'eliminating or at least neutralizing the LRA was a matter of common interest' (Akhavan 2005: 404).

In 2007 the Prosecutor went further, indicating how the Court's process takes the interests of victims into account specifically, stating that in view of the instability of the environments they were working in, the Court had established 'internal guidelines that provide for an ongoing risk assessment for victims and witnesses', and stating that 'the OTP's activities in relation to Uganda exemplify this approach' (Ocampo 2007b: 6). As he noted, this is in line with Article 68(1) of the Statue, which places responsibility for protecting the safety, physical and psychological well-being, dignity and privacy of victims and witnesses upon the Court(*Rome Statute of the International Criminal Court* 1998: Article 68(1); Ocampo 2005b: 3).

A secondary purpose of the ICC's intervention relates to its intention to enhance the national legal processes and systems of the states where it intervenes. The intention is that through ICC engagement the capacity of the host nation to prosecute its own war criminals will be enhanced, and that as the norms of the Court are extended there will be less need for the ICC itself to intervene. As Schabas has commented, this is very much within the spirit of the Rome Statute itself, and the Prosecutor had indicated his belief that 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.' (Ocampo 2007b: 2; Schabas 2007: 1; and see also Nouwen 2013 for an in-depth discussion).

5.1.3 The UPDF as the means for enforcement of the warrants

Violent or volatile contexts demand the collaboration of those best able to operate under such circumstances, and the Prosecutor's approach reflected this understanding. In relation to the role of the military the Prosecutor had indicated his vision of international action to bring perpetrators to justice: 'armies all over the world[…] prepare plans to arrest militia leaders such as Joseph Kony' (Ocampo 2010a: 11). Augmenting the military efforts of the previous decades, with warrants issued, the UPDF through its ongoing war, or other military forces, would be instrumental in effecting arrest. Their efforts to this end would be enhanced by the legitimisation conferred by the Court, the strengthened collaboration with security forces across the Sudanese and Congolese borders, and increased international support for engagement.

While seeking to effect arrest, it was also envisaged that the Government of Uganda would ensure security on the ground, allowing for witnesses' and victims' protection.

> The Government of Uganda has the main responsibility for security on the ground. Working with the Victims and Witnesses Unit of the Registry we have been preparing and implementing protective measures for victims and potential witnesses. (Ocampo 2005b: 3)

Notwithstanding the evidence-based analysis of the community's experience documented in Chapter 4, prosecutorial expectations concurred with a different and contradictory understanding of the war put forward at the time by some legal scholars in the academic literature. One frequently-cited view holds that:

> Hundreds of thousands of civilians have simply abandoned their homes and sought shelter in 'protected villages' where the UPDF provides security. The socioeconomic impact of this massive dislocation and the

> resulting need to provide humanitarian aid has been catastrophic for northern Uganda. In 2003, the population of IDP camps in the Gulu and Kitgum/Pader districts of northern Uganda doubled from approximately four hundred thousand to eight hundred thousand—a figure that represents approximately 75 percent of the region's population of 1.1 million […] by 2002] The government's focus was on protecting its civilian population against further LRA attacks. (Akhavan 2005: 409-410)

This understanding of the conflict, closer to Finnström's discredited 'official discourse', and contrary to Dolan's analysis and the evidence on the ground, was apparently known in legal circles at the time (Finnström 2008; Dolan 2011).

5.1.4 Intervention as the only means to end the conflict

Again setting aside the evidence of Chapter 4, the case for the ICC's intervention was stronger still because the conflict was apparently frozen, efforts to end it being essentially moribund. Akhavan again claimed that by 2003 the amnesty and return process had failed, even aside from legal and ideological objections to its potential to deliver impunity to perpetrators:

> As the tragedy unfolded in Acholiland, there was little international willingness to help Uganda confront the LRA. Despite the catastrophic human toll of the atrocities, there was simply no sufficiently vital interest to prompt action by powerful states[33]. Uganda could not militarily thwart the LRA, primarily because of Sudanese support. Short of invading Sudan's territory and igniting an international war, the UPDF was seriously impaired in its counterinsurgency operations. Efforts at negotiation with LRA leaders were fruitless. Although the vast majority of LRA soldiers were forcibly conscripted children with no interest in continuing the war against the Ugandan government, the LRA's top

[33] In making this observation, Akhavan is setting aside involvement of the US, UK and other powers, in providing military assistance to the UPDF and significant financial support to Uganda's economy, including its military (see sections 4.1.5, 4.2.3, 4.3.2).

> leadership ensured that ruthless discipline was maintained in the ranks. The conflict continued with no end in sight […] Despite defections by foot soldiers - who were largely abducted children - the amnesty policy failed. Not a single senior LRA commander took advantage of it. Indeed, as the LRA's abductions continued into 2002 and 2003, it became clear that nothing short of effective military action against the LRA would drive its leaders to opt for negotiation. (Akhavan 2005: 409)

Notwithstanding the view of the community then, military action was favoured by some. Amnesty International observed that, 'in northern Uganda, an existing Amnesty Law has failed to stop crimes or to bring about peace. Despite the action of peace committees across Acholiland in its support, Amnesty International called for that law to be repealed.' (AI 2006). Human Rights Watch later brought this clear understanding to the wider human rights community:

> Efforts to end the conflict [militarily] decisively failed, and in 2000, following lobbying efforts by 'elders and religious leaders from the (worst affected) Acholi region,' the Ugandan Parliament passed a blanket amnesty for rebels who renounced violence and surrendered to the government […] Although a significant number of people benefitted from the amnesty, violence against civilians continued to worsen in the years following the Amnesty Act, particularly after each effort by the Ugandan armed forces to wipe out the LRA […] In December 2003 Museveni tried a new tack. He invited the International Criminal Court to investigate the LRA. (HRW 2009b: 28)

As demonstrated, these interpretations were not based upon the evidence, but with this understanding of events, including the local and national failure to end the violence, the way was cleared for international action. Advocates perceived that the ICC could play a vital role in isolating the LRA leadership from its forces, through stimulating broader military engagement. The possibility that such an intervention might obstruct alternative approaches or trump local

initiatives to end the conflict was made much less relevant by a disseminated belief in the 'exhaustion of available alternatives' (Akhavan 2005: 410). The Prosecutor hoped a trial would begin within six months (Apps 2005; Clark 2008c: 42).

5.1.5 The addressing of local concerns

Following the announcement of an ICC investigation in January 2004 (Allen 2005: 42; Drew 2010: 24), and even prior to the Prosecutor indicating that there was a case to answer in June (Ocampo 2005b; Schabas 2006: 29), at a local level there was both support and some concern at the Court's engagement (Allen 2005; Tolbert and Wierda 2010). People affected by the violence were desperate to see an end to the war (HURIFO 2002; Dolan 2005; Worden 2008: 4), and while many were worried about the impact of arrest warrants on peace efforts, others believed that this new form of international engagement would one way or another precipitate arrest (Allen 2005; Ocampo 2005a; Pham et al. 2005). As already mentioned, safeguards in relation to security had been considered by the Prosecutor and were to be implemented by the Government for the benefit of the affected communities. From the Court's perspective, the VWU was to provide aid to immediate individual victims and witnesses, which in some cases could represent a significant contribution to their wellbeing. Additionally, as indicated in Chapter 3, in relation to the Court's own process the Statute represents a great advance for victims in relation to their role in Court proceedings (HRW 2008: 149-208).

A second strand of the Court's engagement with the victims and their communities was the 'sensitisation' and outreach meetings carried out by the Court to address local issues and concerns. The Court and its supporters perceived these apprehensions as understandable: local systems of justice were to be set aside by an intervening international institution, and with insufficient information there would be anxiety concerning this move. For example, Human Rights Watch recorded in 2005:

> […] Due to lack of an effective outreach strategy by the ICC, its potential role in ensuring justice and ending impunity in the conflict has been largely misunderstood[…]
>
> The Office of the Prosecutor has only recently begun engaging in greater dialogue with civil society in northern Uganda. Several northern Ugandan leaders travelled to The Hague in February 2005 and on April 14-16, 2005 to urge the ICC Prosecutor not to issue arrest warrants while peace negotiations were ongoing. They included a member of parliament who has been a supporter of the ICC.
>
> The ICC needs to take immediate action to reach out to the people and civil society groups in northern Uganda. This will help the population understand the mandate of the Court. The ICC badly needs to regain the confidence and trust of the people whose interests it is pursuing. It must correct the image it has acquired of an institution subject to manipulation by the Ugandan government for political expediency. It must restore the image of a credible international institution and seek to work with victims of human rights crimes to achieve the ends of justice.
>
> The ICC needs to put in place a robust plan to clarify its mandate, explain its role and clearly outline to the people of northern Uganda what it can and cannot do […]
>
> It is also vital that the Prosecutor quickly act to demonstrate the Court's impartiality. Civil society remains concerned that the ICC is being manipulated by President Museveni […]
>
> The ICC must also put in place adequate witness protection measures […] (HRW 2005: 56-57, This quote will be returned to in 6.2.4).

The International Center for Transitional Justice recommended:

> To the International Criminal Court: Implement an outreach strategy that fosters greater awareness among Ugandans of the Court's mandate and mode of operations. This effort should aim to disseminate more information about the Court and engage the public in dialogue. Such a strategy should also seek to manage the expectations of victims, many of whom believe the ICC can deliver more than it is able (Pham et al. 2005: 42).

The International Crisis Group shared this analysis. In response to concerns about the ICC's possible effects it urged 'a campaign to improve understanding of the ICC among the concerned communities and groups' (ICG 2005c: 6). These institutions thus shared the perspective that the issues raised by the populace could be addressed by educating local people.

Perhaps assisted by its supporters, the Court determined that a process of engagement with the affected community was advisable. Across the LRA-affected areas of Uganda sensitisation sessions provided the participants with an improved understanding of the Court and its purpose. Elements of the message included the Court's relatively restricted mandate in relation to only the most senior commanders, the possibility of international justice being applied alongside local efforts on the ground, the priority placed upon the interests of victims within the ICC's process, and later, the assistance that would be provided to victims. Local concerns about the likely consequences of the ICC's intervention were thus perceived to be due to local misunderstanding or ignorance, to be dealt with through education. This may have addressed a certain lack of information, though its impact on the understanding of the ICC's likely strategic impact upon the conflict dynamics (which was the principal cause of local concern) remained of concern. Anxiety and even opposition to the Court persisted on the ground (ICC 2009a; ICTJ 2009).

A third route through which civil society concerns were ostensibly addressed was the engagement of the Prosecutor and Court with these local

representatives directly (ibid.). As the Prosecutor has stated:

> In all our work we are guided by the interests of the victims and we will always be respectful of local traditions. My team made over twenty missions to Uganda to listen to the concerns of local community leaders, including religious and traditional leaders, local government officials, Members of Parliament and local and international non-governmental organisations. I also had meetings here in The Hague with leaders of the Lango, Acholi, Teso and Madi communities. We agreed we are working together as part of a common effort to achieve justice and reconciliation, the rebuilding of communities and an end to violence in northern Uganda. (Ocampo 2005b: 6)

Their meeting culminated in a joint statement by the Prosecutor and Ugandan community leaders which summarised the issues upon which they could agree: that the LRA should end its violence; that the Governments of Uganda and Sudan and the ICC should cooperate to bring peace; and that international actors should enhance their interventions to alleviate the humanitarian situation (ICC 2005a). Some even perceived that the strategic concerns of local communities were resolved through this process; in any event, the issuance of a joint statement helped to secure credibility for the Court's engagement (Seils and Wierda 2005: 10-11).

Many of those who questioned the ICC's intervention suggested alternative approaches to justice, emphasising that forgiveness may be more culturally appropriate, and this was promoted by some community leaders in Uganda. Contrary to this view, supporters of the Court identified interviews carried out by organisations such as Human Rights Watch and the International Center for Transitional Justice which indicated that few victims desired forgiveness for the perpetrators, and many sought their punishment. Using a population-based survey, the ICTJ reported that when asked about peace and justice 'given the opportunity, many would like to have both' (Allen 2005; HRW 2005: 60; Pham et al. 2005: 4; HRW 2011b: 29). These issues will be examined in Chapter 6.

Aside from these situation-specific measures, there are also the safeguards in the Statute already outlined in Chapter 2. These ensure that the Prosecutor (subject to the Court's processes) could withdraw if he did not consider the ICC intervention to be in the 'interests of justice' (Akhavan 2005: 415-416). This provided reassurance to concerned international institutions (ICG 2005c: 6).

> […] the Prosecutor shall consider whether, 'taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.' Instead of a purely mechanical determination that jurisdiction exists, the Prosecutor must take into account the broader context within which international criminal justice operates. This aspect of prosecutorial discretion is particularly important when investigations or prosecutions may arguably prolong or aggravate ongoing conflict or undermine a fragile peace process. (Akhavan 2005: 416)

Additionally, the UN Security Council itself has the power to suspend an investigation on a twelve month renewable period, according to Article 16 of the Statute, if it is necessary to prioritise peace for humanitarian reasons (ICG 2006a: 1; 2.2.3). As Grono states:

> If a policy decision needs to be made to give primacy to peace—for example, if there is strong and credible evidence that this will save many lives—it should be made by the institution with political and conflict resolution mandate, namely the UN Security Council. The Security Council has the authority under Article 16 of the Rome Statute to put ICC investigations on hold for renewable periods of 12 months. Such authority should only be exercised as a last resort, when there is a compelling case that the benefits of peace will outweigh the harm done to the cause of accountability. (Grono 2006: 2, see also 5-6)

These measures were seen by advocates for the Court to provide a

comprehensive approach that would address the concerns of affected communities.

5.2 The narrative of positive impact on peace talks

5.2.1 The build-up to the Juba talks

The narrative of the Court's positive influence on events continued beyond its initial intervention. In the run-up to the commencement of the Juba talks in mid-2006, further significant positive effects were observed by international experts. The International Crisis Group identified the ICC's positive influences by April 2005, stating:

> The ICC has already had a positive impact on the peace process by sobering the LRA and influencing Khartoum to reduce support. Because of increased contact between Acholi leaders and ICC officials, including Prosecutor Luis Moreno-Ocampo, a spirit of cooperation has replaced suspicion in northern Uganda about the Court's intentions. […] The speed and efficiency of the investigation have heartened human rights advocates looking for evidence of the ICC's relevance to accountability worldwide. (ICG 2005c: 5)

Others went as far as citing evidence for the ICC referrals contributing to the LRA's incapacitation, and even its role in bringing the LRA to the Bigombe negotiations, which began in January 2005. The following was published later in 2005, well before the LRA attended talks in Juba the following year:

> Thus far, the empirical evidence suggests that international commitment to the referral's success has contributed to the LRA's incapacitation. Sudan has been persuaded to end its support for the LRA, culminating in a March 2004 Protocol allowing Ugandan People's Defense Forces

> (UPDF) to attack LRA camps in southern Sudan. This unhindered access has measurably weakened the LRA's military capability, encouraging significant defections among LRA commanders, and forced otherwise defiant leaders to the negotiating table. All of these developments are in sharp contrast to the period preceding the referral, during which LRA atrocities reached a new peak. This recent willingness to negotiate is linked to the LRA's political isolation and military containment—both of which are linked to the new context created by the ICC referral. In this respect at least, it would not be unreasonable to suggest that even without a single prosecution, the LRA referral has already been a success […] (Akhavan 2005: 404-405)[34]

In October 2005 the OTP signed an agreement with Sudan, and following the killing of ICC suspect Raska Lukwiya by the UPDF during a military confrontation in August 2006 the International Crisis Group observed:

> The ICC unsealed warrants against five LRA commanders on 13 October 2005. These rattled the indicted commanders, reduced their opportunity to emerge from the conflict with impunity and put pressure on Khartoum to cut its umbilical cord to the LRA. They gave the rebels an incentive to start talking about a peace agreement that might bring them immunity from prosecution. (ICG 2006a: 15)

The extent of the ICC's impact was outlined by the Prosecutor to the Assembly of States Parties in 2006 as follows:

> While the four remaining LRA commanders are still at large, the Court has made a significant impact on the ground. This case shows how arrest warrants issued by the Court can contribute to the prevention of atrocious crimes. The Court's intervention has galvanized the activities

[34] This passage references the UNOCHA Consolidated Appeals Process 2004 document, and its claim of empirical evidence will be discussed in the next chapter.

> of the states concerned. Uganda and the DRC, parties to the Rome Statute and legally bound to execute the arrest warrants, have expressed their willingness to do so. The Sudan, a non-State Party, has voluntarily agreed to enforce the warrants. Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border.
>
> As a consequence, crimes allegedly committed by the LRA in northern Uganda have drastically decreased. People are leaving the camps for displaced persons and the night commuter shelters which protected tens of thousands of children are now in the process of closing. The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006.
>
> We do not know yet the outcome of these negotiations, but any solution can and must be compatible with the Rome Statute. (Ocampo 2006a: 2)

These claims have been influential, and were quoted by William Schabas during his presentation at the 20th Anniversary Conference of the International Society for the Reform of Criminal Law during the following year, in order to introduce the audience to the context of the Ugandan warrants (Schabas 2007: 15). Though he is far more cautious and the paper is unreferenced, O'Brien's expert opinion on the impact of international justice on local peace initiatives reflects aspects of this analysis.

> In sum, we shouldn't unquestioningly accept a false dichotomy and perceived antagonism between the simultaneous pursuit of justice and peace. Ultimately there may be tensions […] But so far in northern Uganda the two have coexisted and supported one another. (O'Brien 2007: 4)

Subsequently, Human Rights Watch offered a more complete picture of events.

> […] The warrants have contributed to a number of fairly positive events, including isolating the LRA from some of its support base, bringing international attention to the plight of the northern Ugandans, encouraging the most promising talks since the start of the 20-year conflict, and ensuring that accountability formed a major part of the agenda for those talks.
>
> Some analysts argue that Uganda's referral contributed to the LRA's isolation. Since the mid-1990s the LRA's only state supporter has been the Sudanese Government in Khartoum, reportedly in retaliation for the Ugandan Government's support of the rebel Sudan People's Liberation Movement/Army (SPLM/A). Not long after the referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in southern Sudan. This access weakened the LRA's military capability. Following the signing of the Comprehensive Peace Agreement in January 2005, which ended hostilities between the Khartoum Government and the SPLA, Sudanese armed forces withdrew from southern Sudan, further weakening the LRA by depriving it of bases and support that it had enjoyed for years. The International Crisis Group (ICG) notes that the ICC's involvement raised the stakes for Khartoum as it could fall within the ICC's criminal investigation in Uganda for supporting the LRA. In October 2005 the Government of Sudan signed a memorandum of understanding with the Court agreeing to cooperate with arrest warrants issued against LRA commanders. Though Sudan continued to support the LRA to some degree, it did so in a much more surreptitious manner. By severing most of its ties, Sudan significantly weakened the group, forcing it into 'survival mode' at least temporarily. (HRW 2009b: 31-32)

Similarly bold assertions were repeated by Akhavan (2009). Drawing on these observations and interpretations of events, some have made the case that the Uganda warrants are an expression of not only the Court's right to intervene, but also of the international community's responsibility to act (AI 2007; AI 2008; HRW 2008; ICC 2010a: 1; HRW 2011b: 2). Even before the conclusion of the Juba talks, the Uganda warrants had entered the evidence base for the efficacy of international criminal justice interventions.

5.2.2 Kony brought to negotiate

The view that the ICC played a significant role in bringing the LRA to the negotiating table is widely held. It is believed that this took place through a number of mechanisms: personal concern on the part of the ICC suspects and their desire to avoid arrest or trial (Allen 2006b: 114-117; Grono and O'Brien 2008: 19); a process through which the ICC's warrants facilitated the withdrawal of co-operation of Sudan with the LRA, leading the LRA's increased willingness to negotiate (Hanlon 2006; O'Brien 2007; Worden 2008: 5; HRW 2009b: 32-33; Schabas 2011: 39-44); and a more all-embracing view that the multiple effects of the ICC's engagement in addition to the above were significant contributory factors (Akhavan 2005; Ocampo 2006c: 17). It is the Prosecutor's view, expressed at the ICC review conference in 2010 and repeated, that the ICC also contributed to the LRA's displacement not only from Uganda to Sudan, but then to the DRC (ICC 2010a: 6).

5.2.3 The talks collapse

Contrary to fears expressed, that the warrants might obstruct peace talks, many asserted that this was not the case. They held that the Juba talks themselves would likely not have commenced without the input of the ICC, and that the Court played a considerable part in bringing the LRA to the table in the first

place (HRW 2009b: 3; Otim and Wierda 2010; Tolbert and Wierda 2010). In such a circumstance, unlikely though a negotiated settlement might have been, there was little to lose by seeking a deal.

> The inclusion of provisions for justice in negotiations with the LRA in Uganda that resulted from the ICC's pursuit of LRA leaders likewise did not scuttle those peace talks, despite the concerns of many who advocated an amnesty.
>
> In Uganda […] many commentators feared that justice and the involvement of the International Criminal Court would prove an obstacle to peace […] the warrants did not have any immediate devastating impact. The ICC's involvement may even have yielded unexpected short-term positive benefits including encouraging the parties to engage in peace talks, prompting some LRA defections, and raising the political costs to those supporting the LRA. (HRW 2009b: 28-29)

Secondly, they hold that it is quite possible that the LRA was simply using the hiatus created by the talks to regroup and rearm (Akhavan 2009: 644). As the Prosecutor observed:

> In the past, Joseph Kony has used negotiations to buy time, regroup and attack again. Securing the arrest of the four remaining LRA commanders would prevent recurrent violence and provide justice to the victims. This is a core challenge facing the Court and you as States Parties to the Court. You must ensure that the principles of justice and deterrence underlying the Statute are upheld. The victims have a right to peace, security AND justice. (Ocampo 2006a: 3)

Additionally, the narrative asserts that there always were multiple possible reasons for the talks to fail, including the likelihood that the LRA would not engage in them in good faith in the first place, and evidence of the LRA's past failure to see such processes through (Otim and Wierda 2010: 5). It is also

possible that Kony is a 'total spoiler' himself—that he would never come to a negotiated deal, and that his removal ideally through the Court's process, could itself pave the way for a deal (Struett 2012: 87-88).

With so many possible influencing factors, proponents of this view hold that the presence of ICC warrants may or may not have been a significant contributory factor in the talks' collapse, and given the many uncertainties it is not possible to attribute the outcome to any one factor alone.

5.3 The narrative concerning the subsequent ongoing war

Following the collapse of the Juba talks, the positive account of the ICC's influence upon the conflict has been sustained. In mid-December 2008, at the conclusion of the Juba talks, a military offensive was launched by the Ugandan, DR Congolese and southern Sudanese forces against the LRA in Garamba. Operation Lightning Thunder failed to decapitate the LRA, and their familiar pattern of reprisals and atrocities resumed, most notably and tragically at the end of December 2008 and into January 2009, when they massacred over 850 civilians in DRC (HRW 2009a). The years since these events have brought the dispersal of the LRA into small groups across a wide area, principally of DRC and CAR. Although abductions and killings have continued the organisation may be weaker than it was, perhaps due to the international isolation associated with the warrants (Invisible Children 2014).

Some go so far as to identify the talks as a success. As they point out, peace has returned to northern Uganda and people have been able to go back to their homes; and the LRA leadership were provided with a final opportunity to end their murderous campaign before international military pressure was brought to bear (Otim and Wierda 2010: 5; Kersten 2012: 74-75). The LRA are now

scattered and diminished, much less capable of posing a realistic threat to the civilian population thanks in part to the Court's intervention.[35]

5.3.1 Review Conference findings—a paradigm shift

The Rome Statute stipulated that the Court undergo a review process following its establishment, and this duly took place in Kampala in 2010 hosted by the Ugandan Government (*Rome Statute of the International Criminal Court* 1998: Article 123). This was perhaps the best opportunity for an evaluation of the Court's impacts to be examined, concerns raised, and lessons learned on an international stage. In relation to the LRA warrants specifically, material presented at the review relating to Uganda indicated a dramatic fall in LRA violence. It also highlighted the achievement of peace in the country's formerly LRA-affected areas, following the Court's intervention (ICC 2010a; Otim and Wierda 2010; Tolbert and Wierda 2010).

Civil society representatives from the LRA-affected areas of Uganda and Sudan were also represented at that event, and the work of the VWU was showcased so that delegates could gain a measure of the breadth of the ICC's humanitarian engagement.[36]

More significant perhaps than the individual findings were the broad conclusions that were drawn (ICTJ 2010). Notwithstanding the failure of the talks and the resumption of violence, the ICTJ presented the following assessment in its Conference briefing paper on the Uganda case:

[35] This view emphasises the LRA's impact in northern Uganda particularly, and the very significant decline overall in its activities. Individual communities in DRC and elsewhere continue to experience LRA violence.

[36] Community representatives from the areas more recently affected by the LRA, including the DRC, were also present. I witnessed testimonies from them expressing dismay at becoming victims of LRA violence—embroiled in a war in which they had no part. Though their suffering was clearly associated with the move of the LRA from Uganda, their experience has been less prominently emphasised in the dominant narrative.

> The Uganda experience demonstrates that an ICC intervention need not prevent the peaceful settlement of a conflict. Instead, the international pressure resulting from the arrest warrants was carefully utilized at Juba in order to negotiate a solution that would seek to achieve a comprehensive approach to justice at the national level. (Otim and Wierda 2010: 6)

This perception of success became evidence to support wider positive conclusions, and the interaction of peace and international criminal justice issues was dealt with specifically in the deliberations. The submission of written material was followed by presentations from a panel of prominent practitioners from legal justice, peace and human rights disciplines. The subsequent discussion involved States Parties, prominent NGOs and civil society organisations. The ICTJ's view concurred with those of the moderator of the session. Introductory remarks to the assembled States Parties by Kenneth Roth (then Executive Director of Human Rights Watch) framed the debate:

> In introducing the topic, the moderator affirmed that justice is an important end in its own right. Mr Roth also pointed out that there were already quite a few examples of the interaction between peace and justice. From these examples, it was possible to extract some preliminary lessons learned:
>
> *(a) In the short term*
>
> (i) The dire consequences that had been predicted would occur from pursuing justice had fortunately not materialized.
>
> (ii) Issuing warrants for suspected war criminals had helped move forward peace processes by marginalizing detrimental actors.
>
> (iii) In contrast, incorporating those with records of past abuses into governments in an effort to secure peace often had had unanticipated negative long-term effects.

> (iv) Amnesties (implicit or explicit) also often did not lead to the hoped-for peace. Instead, in several cases, they had sent a dangerous message that abuses would be tolerated and therefore had encouraged more violence. (Roth 2010: 1)

The official report on the session concluded decisively in favour of the Court's interventions, with respect to the attainment of peace with international criminal justice, in a new positive relationship:

> Among the conclusions of the debate, the discussions made clear that the establishment of the International Criminal Court had brought about a paradigm shift, in which amnesty was no longer an option for the most serious crimes under the Rome Statute. There was now a positive relationship between peace and justice although tensions between the two remained that needed to be acknowledged and addressed. Other issues debated at the panel were the sequencing of peace and justice, the role of mediators in peace processes, the effects of international justice, non-judicial mechanisms, and the views of victims. (ICC 2010b: 5)

In part informed by these events, this narrative holds that, in relation to peace and justice, a paradigm shift has occurred. Far from obstructing peace in the short-term, justice measures have tentatively been observed to enhance its prospects, while in the longer term the alignment of these issues has been established. This view proposes that events have unfolded to the benefit of affected communities, who deserve to receive international standards of justice. Other approaches have been characterised as 'Selling Justice Short' (HRW 2009b; ICTJ 2009).

5.3.2 Successes and failures of enforcement

The delay in achieving arrest is addressed in the narrative, and noted as a significant shortcoming. It observes that there has been a failure of the international community to act with sufficient commitment. With Lukwiya dead at the hands of the UPDF in August 2006 (Mukasa 2006); Otti apparently dead following a disagreement with Kony in October 2007 (Mwakugu 2008), three of the suspects remained at large for nearly a decade. Odhiambo was then confirmed dead in March 2015 (ICC 2015e). Only Dominic Ongwen has been arrested, captured in CAR and handed over to the Court in January 2015 by US forces. His trial before the Court was hailed as real progress. Of the 2005 suspects only Kony remains at large (BBC 2015c).

The former Prosecutor asserted, it is the failure to enforce, not a shortcoming of the Court, that has led to the continuation of the war and the failure to apprehend the accused. It reflects a lack of commitment on the part of the international community to deliver on its commitments to the enforcement of international criminal justice. In this context the ICC Prosecutor continued to call for robust enforcement of the Court's warrants, so that the accused may be brought to justice (Ocampo 2007a).

5.4 Review

We can now see that a positive account of the Court's impacts was sustained from prior to the issuance of its warrants, through its effect on the military dynamic of the conflict and the commencement and collapse of the Bigombe and Juba peace processes, and on to the present ongoing violence. Within this narrative there are a number of prominent claims or positions that apparently secure the legitimacy and establish the efficacy of the Court's intervention. In order to test the basis in evidence of these claims it is useful to articulate them briefly, indicating prominent or principal proponents:

1. The ICC intervened on behalf of the abducted children and their communities (Ocampo 2005b: 6; Ocampo 2006a); 5.1.2).
2. The ICC was intervening in a frozen conflict, in the absence of effective alternative strategies likely to bring it to an end (Akhavan 2005); 5.1.4).
3. The ICC might withdraw (or be withdrawn) at any time in the interests of justice, should it be absolutely necessary (Grono 2006); 5.1.5).
4. The UPDF was an appropriate means for enforcement of the warrants—indicated by the Prosecutor's joint statement with President Museveni in London on 29th January 2004 (HRW 2004a; ICC 2004b; 5.1.1, 5.1.3)
5. The ICC, with others, brought Kony to the negotiating table (ICG 2006a; Ocampo 2006a; Grono and O'Brien 2008; Akhavan 2009; author's article now being revised prior to resubmission; 5.2.2).
6. The ICC was not responsible for the collapse of the talks (Ocampo 2007a; HRW 2009b: 3; Ocampo 2009; 5.2.3).
7. The LRA were in any case preparing for a resumption of the war, so they were not negotiating in good faith (Ocampo 2009; 5.2.3).
8. The ICC's impact reduced the intensity of the conflict, and the associated suffering, whether through the deterrence its warrants conferred or other means (Akhavan 2005; Ocampo 2006c: 17; 5.2.1, 5.3, 5.3.1).
9. Local communities deserve international standards of justice. Other approaches are selling justice short (AI 2006; HRW 2009b; ICTJ 2009; 5.3.1, 5.3.2).
10. It is now only a matter of time before Kony is apprehended and tried in a court of law to international standards, with the implication that enforcement efforts will have been worth it (Apps 2005; Ocampo 2005a; Ocampo 2009; 5.3.2).
11. The interests and actions of the ICC are aligned with those of communities affected by conflict (Ocampo 2005b: 6; Ocampo 2006a: 1-3; Ocampo 2007b; 5.1.1, 5.1.2, 5.3).

In many respects the narrative proposed by this account is an extension of the official discourse outlined in (4.0.1). International intervention, this time in the form of the Court, was perceived to be of benefit to the population who were understood to be in great need of humanitarian assistance. While being more protracted than originally envisaged, the narrative holds that the ICC's engagement itself was and remains appropriate and beneficial to the people concerned. Each element in this account is amenable to scrutiny. The next chapter will critically examine these points for their foundation in evidence.

Chapter 6 ICC intervention—an evidence-based assessment

> Because the consequences for people at risk are so great, decisions on these important issues need to be fully informed. (HRW 2009b: 9)

This chapter is not the first to challenge the dominant narrative; that has already been done in some significant specific respects (ARLPI and JPC 2001; ARLPI et al. 2003; Finnström 2008; Branch 2011; Dolan 2011; Talebpour 2012). Instead, this section will more comprehensively test the dominant narrative's reasoning and relationship to the evidence as a whole. Founded upon the author's work with local peacebuilding organisations in the affected region indicated in the introduction, the analysis draws upon data and experience collected from the ground at the time in question, including that undertaken by academics, community-based organisations, and other agencies based in the field. The emerging interpretation rests solidly upon data collected from the community, lived experience in the war-affected area, and accounts drawn from community-informed observes active on the ground. The intention is to reveal whether the dominant narrative is corroborated, uncorroborated, or contradicted, and whether it is soundly adduced. It is only through such independent analysis that an understanding of events consistent with the local experience can emerge, future decisions be appropriately informed, and adverse consequences for people at risk be avoided. In particular, this analysis will form the basis for findings of relevance to the Court itself, beyond the specific circumstances of these warrants.

6.1 Analytical errors and the accommodation to military power

At the outset it is necessary to acknowledge a disjuncture between the dominant narrative and the evidence-base from the ground previously outlined in Chapter 4, which relates to the fundamental structure and dynamics of the conflict itself. Founded upon this body of work (which remains very largely unchallenged on the basis of evidence in the literature) it has already been demonstrated that the civilian interests were in many cases not promoted by the Government of Uganda, nor was the population afforded protection (ARLPI and JPC 2001; Baines 2003; Branch 2004; Rodriguez 2004a; Branch 2005; Finnström 2006a; Finnström 2006b; Finnström 2008; Rodriguez Soto 2009).

The ICC engaged with the conflict allied to a significant perpetrator, the UPDF. In multiple cases before and after the arrest warrants were issued, and for much of the preceding two decades as has been shown, the community was a victim of the UPDF and the Government, as well as of the LRA. Government conduct was characterised by some as 'social torture' (HURIFO 2002; Dolan 2005; Dolan 2011). Government abuses were documented even by institutional supporters of the Court and the UPDF (AI 1999; HRW 2002a; ICG 2004; HRW 2005; Hepple 2010; HRW 2011b: 24-27). Abuses by the UPDF and Government, both individual and en masse at a policy level, included forced displacement, which continued after ICC warrants were issued. These general observations rest upon the material of Chapter 4; however, a more detailed analysis of each of the Court's principal claims is required.

We have already encountered the evidence that the UPDF's strategy to end the war had for many years largely entailed seeking to kill LRA fighters, who were for the most part abductees, faster than the LRA could abduct and train new ones. Chapter 4 also provided evidence that abduction by the LRA was in effect unhindered. They were able to abduct thousands of young people when needed, to meet their requirements (UNOCHA 2004: 1). Also as noted,

'success' as evidenced by the UPDF's own statements reported in the press, was measured by the number of LRA (mainly abductees) remaining, a smaller number implying greater UPDF accomplishment. This was apparent prior to the ICC's full engagement, and observed by the International Crisis Group:

> The army's main measurement of success seems to be the body count, which is misleading as it ignores the lack of importance the LRA places upon the abductees it has turned into combatants. Whenever the army kills a number of LRA, more are abducted. Many commentators have suggested that the army is mostly killing recent abductees, not the LRA's hard-core fighters. At times abductees are tied together to prevent escape; when the army fires rockets and heavy artillery, most of the casualties are child soldiers. The government gave assurances that Operation Iron Fist would not affect its efforts to rescue abductees but military operations often continue to be clumsy, bloody and indiscriminate. (ICG 2004: 14)

While this reference does not quote evidence, its observations are consistent with first hand accounts and local research (Dolan 2000b; ARLPI and JPC 2001; HURIFO 2002; ARLPI and Justice Resources 2003). Casualties were not limited to child soldiers, and included new abductees. Rodriguez Soto observed the pattern of the war when he recounted the following:

> 'UPDF kills 19 rebels' was the main headline of the New Vision on 7th January 2003. Quoting the army's spokesman, the government newspaper assured its readers that four days earlier two helicopter gunships had bombed a large group of rebels in Pella, a few kilometres from Namukora [sic], in Kitgum District, putting 19 of them 'out of action'[…] Parents of children who had been abducted a few days earlier confirmed their worst fears when they found the corpses of their children. (2009: 116-117)

As outlined in Chapter 4, the failure of the UPDF to kill the LRA abductees/ fighters faster than the LRA could abduct more had led to a war in which the central dynamic between the two militarised parties was of abduction (by the LRA) and killing of abductees (by the UPDF). These observations were made on the ground, known within informed elements of the diplomatic community, and reflected in local reports.

Notwithstanding calls to investigate the Ugandan authorities as well, supporters of the Court's intervention in Uganda have made the same error, citing abduction of the youth by the LRA to legitimise the Court's intervention, and by extension its violent enforcement (HRW 2004a; Akhavan 2005; AI 2006). When the Prosecutor issued the warrants and charged the Ugandan Government with the task of arrest (Ocampo 2005b; Ocampo 2005a; Ocampo 2007a), which could only be achieved by military means through the war, he inadvertently further legitimised the long-standing UPDF strategy and conduct, including the killing of abductees.

The dominant narrative also fails to appreciate the evidence presented in Chapter 4 that, acknowledging the horrors of the LRA attacks, it was displacement of the population from their homes to the camps that precipitated the destitution of the population, and was the principal cause of death amongst them. This was a result of communities obeying government orders, often enforced with violence, and fleeing LRA atrocities. By the end of 2001, both armed parties were responsible for very significant levels of displacement in the region, amounting to approximately 500,000 people (ARLPI and JPC 2001). Following the launch of Operation Iron Fist in April 2002, LRA attacks on civilians intensified from mid-2002, and the numbers of displaced rose to 800,000 by June 2002 (UNOCHA 2003). In September/October 2002 the Government made a third order for people to abandon their homes, and displacement rose again (Rodriguez Soto 2009: 105-107). At the hands of both sides communities were removed from access to their land and prevented from returning by the threat of encounters with the LRA or UPDF (since those found

in the countryside could be shot as suspected LRA sympathisers). By 2004 the number displaced in the Acholi districts peaked at approximately 90% of the Acholi population (over 1.1 million people) (UNOCHA 2004; UNOCHA 2005a). In the following 6 months to July 2005 excess deaths amongst those displaced were running at approximately 1,000 per week. As indicated in Chapter 4, less than 10% of these were due to violence—still fewer due to violence by the LRA (Ministry of Health of Uganda and World Health Organisation 2005). These human rights breaches fell squarely during the ICC's intervention, the warrants being issued under seal in July 2005, the same month as the WHO's report was published. By any measure, while not discounting LRA atrocities and responsibility for displacement, the UPDF was also a significant killer before and during the ICC's engagement (ARLPI and JPC 2001; HURIFO 2002; Baines 2003; UNOCHA 2003; UNOCHA 2004; UNOCHA 2005b).[37]

Aside from observing the death rate amongst the displaced population and urging a peaceful resolution of the conflict as the most crucial step, the WHO recommended IDP camp 'decongestion' (i.e. allowing people to leave) as the first measure to address the underlying causes of the high death rate.[38] This call came four years after the publication by local religious leaders of the ARLPI/JPC research report *Let My People Go*. This drew public attention to the suffering in the camps (then holding over 50% of the population), and called upon the Government to allow their return home (ARLPI and JPC 2001; Rodriguez 2004b).

Also inconsistent with a binary view of the conflict, indicated in 4.0.1, was the government's opposition to, and obstruction of, community-led measures designed to address the war through the return process. In particular the hindrance of the Amnesty Law and its institutional implementation, and the

[37] Article 8 of the Rome Statute itself, sub-section 2,(e) viii in fact defines such enforced displacement as a war crime, except where demanded by the security of the civilians involved or imperative to military operations. It seems questionable whether a defence on the basis of civilian security could be made, given the violent attacks by the UPDF against civilians in the process of enforcing the displacement.
[38] Stepping up efforts to protect the IDP camps from violent attacks was second.

undermining of civil society efforts to de-escalate the conflict through its function, are notable (Armstrong 2010: 274). The dominant discourse fails to acknowledge these occurrences, which are well documented. The observation that the UPDF's military was hugely more expensive and far less effective at extracting the abductees from the LRA than the return process, despite some interaction between these elements, further underlines this divergence. Additionally, as we have seen in Chapter 4, the UPDF's methods generally involved killing the abductees, while civil society efforts secured their exit from the LRA alive (Rodriguez 2004a; Rodriguez Soto 2009: including 38-39).

With these understandings rooted in research from the ground from multiple community-based or community-informed sources, and first hand accounts, a view of the conflict as two-sided is untenable. It ignores the Government's (and its military's) complicity in the deaths of many thousands of civilians through displacement, its strategy of fighting the war without preventing abduction which implies the killing of the stream of abductees over some decades, and its obstruction of the community-based return processes to bring abductees back alive. These were not peripheral issues but the central long-term dynamics of the conflict, ample documentation associating them with the main causes of death and suffering of the population. The bipolar view of the conflict is one that ignores the fate of the affected civilian population over two decades. According to the evidence base, the view that civil society interests were in some way represented by the Government and furthered by the military, is thus profoundly mistaken. Field-based research provides a solid body of evidence to discredit the binary view, and clearly identifies that the conflict had three (or more) principal parties—the Government/UPDF, the LRA, and (arguably as a more disparate entity) the community.

The evidence upon which a three-sided interpretation of the conflict is based, which largely precedes the ICC's intervention and was thus available to the Court prior to its engagement, is not in any case significantly opposed. There are no studies at the community level based on witness testimony that propose that the camps were mainly created by the LRA; no studies that challenge the

view that the camps were the main cause of excess deaths; and (notwithstanding the complexities of the issues), no studies that indicate the LRA was not comprised of abductees to a significant degree. Nor has any evidence been proffered to suggest that killing the abductees once integrated into the LRA was more effective or cheaper than getting them out alive. There is a wealth of evidence from the conflict context, and none of it serves to sustain the belief that the Government/UPDF's conduct was somehow consistent with the interests of the war-affected population, in a two-sided conflict against the LRA. The evidence of survey data from organisations and researchers on the ground, and the lived experience of the author and others, demonstrates this (HURIFO 2002; ARLPI et. al. 2003; ARPLI 2004; Dolan 2002, 2005, 2011; Finnström 2006b, 2008; Rodriguez Soto 2009). On the basis of this material and outlined in section 4.4, communities were working for a different outcome in the war (peace, and return of the abductees alive), by means opposed by government, LRA and ICC (mass amnesty and return precipitating unconditional negotiation by all sides), while they were being targeted violently by LRA and government. On this basis, it was a three-sided war.

This evidence enables the examination of the dominant narrative from a more informed perspective; understanding the community as victim of both militarised factions, but also as a party with agency, deploying its own strategy (or strategies) for coping with and ending the conflict—strategies that were actively opposed and disrupted by the other main parties. In this context the intervention of the ICC on the side of the Government and its military approach is notable (Ocampo 2005b). In doing so they engaged with the only party to the war that shared its overriding institutional commitment to the prioritisation of retributive justice for the LRA leadership, and (as they hoped) the capability to enforce it. The ICC entered the war on the side of the Government's military campaign, perceiving that through doing so it could further international criminal justice.

6.1.1 UPDF as perpetrator, protector and enforcer

Regardless of the issue of conflict analysis, the Court would have been cognisant of significant practical concerns bound to its wider purpose, for which collaboration with the Ugandan Government/military might have seemed logical or even necessary. The retributive approach to justice required by the ICC demands enforcement, and in the violent context of war in northern Uganda such enforcement against the LRA leadership was inevitably not a civil but a military process (5.1.3). At the time, and subsequently, there had been little appetite internationally for Western military intervention on the ground, though small numbers of external military advisors had been present from time to time (author's observation).[39] In the short- or medium-term, ICC enforcement on the ground in Uganda implied action by the UPDF.

The UPDF was already internationally known for perpetrating crimes against civilians. The International Court of Justice in The Hague was already considering charges against Uganda's armed forces for killing, torture and inhumane treatment of civilians, training child soldiers, inciting ethnic conflict, destroying villages and civilian buildings, and plundering and exploiting the resources within the DRC. In 2005, the same year as the warrants were issued and two months after they were unsealed by the Prosecutor, Uganda was found guilty of these crimes (ICJ 2005a; ICJ 2005b). UPDF abuses were not restricted to the DRC. Human Rights Watch and others had already published material documenting UPDF brutality in Uganda (AI 1997; Gersony 1997; HRW 2002a; HRW 2003a; ICG 2004; HRW 2005). As demonstrated by its storming of Gulu prison in 2002, and the execution of youths outside Gulu police station in the same year (4.2.3), the UPDF's role in relation to Uganda's legal system

[39] I encountered or heard of US or other expatriate military personnel were present in Gulu from time to time after my arrival in 2000. My informal enquiries to UK diplomats from DFID and the Foreign Office in Kampala suggested this at the time. The UK's military engagement in Sierra Leone from (2000), Afghanistan (2001) and later Iraq (2003) were offered as reasons for reluctance on behalf of the former colonial power to intervene.

was also questionable. If the Prosecutor had legal or humanitarian concerns, these must have been outweighed by practical considerations relating to ICC enforcement.

As indicated in Chapter 5, the prevalence of human rights abuses by both sides but the action against the LRA alone was criticised by some. However, (and importantly), according to the Prosecutor the measure of the gravity of the crimes includes assessment of their scale, nature, manner or commission, and impact (AI 2004; HRW 2004a; Akhavan 2005: 411; Ocampo 2006b: 5; HRW 2011b: 25-26). The threshold that triggered the warrants was in his assessment met by the LRA only, and not the UPDF; LRA crimes were seen as 'much more numerous and of much higher gravity' (Ocampo 2005b: 2-3). Certainly LRA crimes were generally more eye-catchingly gruesome and horrific. However, the measure of 'gravity' seems not to have related to the actual number of deaths resulting from the actions of a party, as with the death rate from displacement the UPDF would then be brought back into the frame (ARLPI and JPC 2001). The Court had failed to publish any measure by which attribution should fall upon one party or the other, apparently ignoring the issue despite its centrality in relation to most of the deaths. It seems likely that the manner of LRA crimes, the conspicuously pitiless attacks and mass atrocities on defenceless civilians, is what prompted its unique selection for warrants in this context. However, these distinctions are not clear: the lack of transparency of the Prosecutor's assessments of what is meant by 'gravity' in this context is concerning.

The Court faced a further challenge—how to adequately discharge its responsibilities to consider witness and victim protection - a requirement imposed by the Statute (*Rome Statute of the International Criminal Court* 1998; Ocampo 2005b: 6). This duty was apparently fulfilled through an ongoing risk assessment process. However, security had already been placed in the hands of the Government of Uganda and the UPDF. There would have been few

alternatives perhaps[40], but to overtly place security in the hands of forces whose strategy had resulted in thousands of deaths was a move that caused local concern. To do this, knowing that all LRA atrocities up to that point had taken place under the 'protection' of the UPDF, further underlines the inadequacy of this response. The Prosecutor implicitly acknowledged this issue in 2007, when he identified witnesses as having taken 'tremendous risks to tell their stories' (Ocampo 2007a). These inadequacies of security were addressed solely through consultations, in this case with the local civil society leaders, and were hailed by the Prosecutor as exemplifying his approach (Ocampo 2005b: 3; Ocampo 2007b: 5-6).

In the context of the war as a three-sided conflict, and awareness of the abundance of evidence indicating UPDF brutality at the local and strategic level over the preceding decades, local anxieties were well-founded. They were based upon their experience of LRA and UPDF violence towards them, and the Court's association with violent enforcement methods. Failing to perceive community concerns as material, indeed apparently assuming they were based upon ignorance, the Court addressed them through information dissemination (ICG 2005c: 5-6). As its annual Outreach Reports demonstrate (2007; 2008; 2009a), following a familiar pattern of external intervention, these were intended to educate the populace about the Court. In these reports the 'lessons learned' in relation to the Uganda cases from 2007-2009 were entirely focused around establishing how to improve the outreach work itself, rather than on any knowledge gained by the Court from civil society about the war. The Court's efforts were hailed by some supporters as a positive step forward, though by 2008 'misinformation and negative perceptions' were identified as remaining (ICG 2005c, 5-6; HRW 2008: 36,116-125,126).

Findings from an ICTJ survey carried out over two weeks in 2005 in Gulu, Kitgum, Lira and Soroti, though flawed in various respects to be discussed, indicate that communities had significant issues with the UPDF. A higher

[40] The issue of witness protection measures and means to address local anxieties are discussed in the next section.

proportion of those surveyed believed that UPDF rather than LRA offenders should be put on trial. Despite its weaknesses and the profusion of possible confounding variables, the survey indicates civilian distrust of the army, to whom the Court entrusted security arrangements (Pham et al. 2005: 5; Pham et al. 2007).

In summary, the case study has so far revealed operational challenges for the Court relating to its engagement of the UPDF as a key enforcer of its warrants, protector of the people, and as significant perpetrator of war crimes below the ICC's threshold level. These matters, relating to both local and strategic levels of the conflict, are essentially case-specific. However, they are associated with the Court's institutional prioritisation of retributive justice, and the related requirements for political and military accommodation in order to achieve its purposes—matters of wider significance that have been touched upon by other authors that will be further considered in Chapter 7 (Snyder and Vinjamuri 2004; Rodman 2006; Branch 2007b; Branch 2007a; Snyder and Vinjamuri 2007; Nouwen and Werner 2010; Rodman 2012; Struett 2012). For now it is sufficient to observe that the case raises questions about the means by which international criminal justice is pursued in volatile contexts—ones that concern potential trade-offs between international criminal justice enforcement and the human rights of those who may fall victim to enforcement efforts. Overtly, it highlights operational matters of enforcement.

6.2 The misalignment of interests

Extending this theme, the study now examines the proposed association of the Court's purpose with the interests of communities affected by violence. Issues of misalignment of Court and community interests began to emerge from the earliest stages of the ICC's intervention (Armstrong 2010).

6.2.1 Failures of complementarity and deterrence

> […] The Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a step in triggering the jurisdiction of the Court. This policy resulted in the referrals for what would become the Court's first two situations: northern Uganda and the DRC. The method of initiating investigations by voluntary referral has increased the likelihood of important co-operation and on-the-ground support. (Ocampo 2006c: 7)

A notable feature of the acceptance of referral and subsequent issuance of warrants relates to the legal purpose of ICC intervention. The Statute anticipates that the Court's engagement will help to strengthen domestic state legal processes, and indicates that referral to the ICC should be associated with the need to enhance the legal processes of the domestic courts, and thus enable prosecution. The ICC is not intended to displace functional civil/ legal processes in signatory states (*Rome Statute of the International Criminal Court* 1998: Article 1). Alongside the ICC's intervention, considerable efforts took place to strengthen the Ugandan legal apparatus, and a War Crimes Division of the High Court of Uganda was established in 2008 (Otim and Wierda 2010).

However, it has been noted that the Ugandan legal system did not require assistance in this regard, being quite capable of carrying out a trial should the leadership of the LRA have been apprehended, and already having a duty to do so (Schabas 2007: 13). Without evidence of the need for the ICC's intervention, it has been suggested that the ICC might instead have strengthened the Ugandan judicial system not by relieving it of its task, but by reminding it of its responsibilities. There may be more effective and cheaper ways to strengthen local capacities than through the Court (Nouwen and Werner 2010: 947; Schabas 2011: 164-167; Franceschet 2012a).

In any case, legal challenges were never the principal issue. As previously described and as indicated in the Prosecutor's statement above, the Court sought Ugandan assistance to effect arrest on the ground; the Ugandan government too perceived a mutual interest, not because of inadequacies it perceived in its own legal system, but because it determined that ICC engagement could legitimise its military effort and enhance international military support. It was the desire to militarily apprehend the leadership of the LRA that motivated Uganda's self-referral; the opportunity for enforcement that prompted the Court (ICC 2004b; Schabas 2011: 167; Rodman and Booth 2013: 285-286; Freeland 2015).

If the positive impact of referral on the complementarity of legal systems has been questionable, some other anticipated benefits from the early stages of the Court's intervention have been disappointing. Internationally, and from the outset, it had been anticipated that a primary impact of the Court would be through the deterrent effect it would bestow. Associated with the establishment of an 'era of enforcement' of international criminal justice anticipated by Robertson, it was hoped that the expectation of apprehension and trial will one day stay the hand of would-be perpetrators worldwide (Grono 2006; Robertson 2006; Grono and O'Brien 2008). This may be so. In the short-term, as a first step towards this goal, some degree of deterrence may be hoped for in relation to individual cases. Once a situation has been referred to the Court, and before warrants are issued, perpetrators might moderate their behaviour in an effort to avoid the attentions of the Prosecutor (Ocampo 2006b: 6). This effect could even endure beyond the issuance of warrants, though rationally, the opportunity to influence suspects is greatly reduced once their arrest warrants are issued and unsealed. They may no longer escape attentions of the Court, which itself anticipates a successful prosecution on the basis of crimes already committed (Grono and O'Brien 2008: 18).

There seems to have been no deterrent effect in the Uganda case, even during the window following referral, prior to the Prosecutor formally opening his

investigation. The Barlonyo massacre previously mentioned—one of the worst atrocities committed by the LRA up to that time—followed less than two months after Uganda's self-referral to the Court, and well before warrants were issued or unsealed, in the period when deterrence might be hoped to be at its peak.

Anyone still optimistic that the Court's intervention might instead moderate the LRA's behaviour after issuance of warrants will also have been disappointed. The Christmas Massacres, in which over 850 civilians were killed by the LRA from 24th December 2008 to 17th January 2009, were the most intense period of LRA violence to date. It must surely have been these grotesque atrocities that the Court was intended to deter, and it is most regrettable that this was not the case. The hope and expectation that, despite showing no deterrent effect when focused on individuals under investigation, it will deter others elsewhere in the longer term, remains.

Thus, in relation to complementarity, the Court addressed a problem that may not have existed, with questionable effect; and in relation to deterrence, it failed in both a specific and general sense to deter atrocities before and after arrest warrants were issued.

6.2.2 Implementation of the Statute trumps assistance to communities

From an early stage there was a widespread expectation, at least in general terms, that the interests of the Court and communities affected by violence would be similar. According to the Rome Statute the Court is intended to benefit present and future generations through its work to extend the rule of international criminal law (*Rome Statute of the International Criminal Court* 1998: Preamble). According to the Prosecutor it is also anticipated to benefit the current victims of conflict: 'we are their Court' as the Prosecutor has stated (Ocampo 2010a: 11). This claim merits consideration. Bound by its Statute, the ICC cannot intervene for a purpose it is not mandated to act upon. But the hope that it will intervene for affected communities will be borne out only in

instances where community interests are aligned with those of the Court in implementing the Statute—that is, with the specific approaches to justice that the Court implies as outlined in Chapter 3. Where the interests of the war-affected population diverge from the purposes of the Statute the wider interests of 'justice' as interpreted in law must prevail and will be imposed. Evidence from this case study is instructive.

The first point of note is already substantiated. The ICC, driven by its retributive priorities, issued warrants following the Government's self-referral, and through that process legitimised the UPDF as its principal enforcer. Some even invoked the plight of the population in the camps, misattributed their displacement as the work of the LRA, and called for justice (Akhavan 2005: 409; Ocampo 2005b: 1). Thus, from the announcement of the warrants the interests of the Court and the community had begun to diverge.

Secondly, also in relation to the preceding evidence, the ICC was apparently intervening on behalf of the abductees who were (and are) some of the principal victims of the LRA. Many of them were the abducted children[41] who had inadvertently become the LRA's foot-soldiers, whose plight had galvanised concern worldwide (AI 1997; HRW Africa and HRW Children's Rights Project 1997; Omona and Matheson 1998; Egeland 2003; HRW 2003a). Commentators explicitly noted their plight, one even perceiving in the same paper their interests as justifying the Court's intervention, having previously stated the need for their 'neutralization'. Abductees, as LRA fighters, were targeted by the UPDF, the ICC's enforcer, and yet:

> […] the vast majority of LRA soldiers were forcibly conscripted children with no interest in continuing the war against the Ugandan government, […] (Akhavan 2005: 409, see also 407)

[41] The human rights literature often refers to 'abducted children', and although it was mainly children who were retained by the LRA following abduction, this term is not entirely accurate as many adults were also abducted. Additionally, quite a number of those abducted as children became adults while in the LRA.

However:

> Despite colonial-era tensions between northern and southern Uganda, eliminating or at least neutralizing the LRA was a matter of common interest. (Akhavan 2005: 404)

Akhavan's notion mirrors the Court's apparent misunderstanding about the conflict dynamic, articulated with evidence in Chapter 4. Many or most of the LRA fighters were the abductees from the community; they were amongst the victims the Court was seeking to benefit. Their killing by the UPDF, without preventing further abduction by the LRA, was a central long-term dynamic of the war; and ICC warrants were intended by the Government to strengthen international support for the UPDF's combat operations. Akhavan's article was timed to explain the Court's sanctioning of military action against the LRA, and its entry into the devastating conflict dynamic. Victims of the LRA as abductees, who became victims of the UPDF as LRA foot-soldiers, became victims of the enforcement operation for the Court's warrants.

In the same period, research was carried out that indicated the people's desire for accountability,[42] including in some cases for Kony's arrest, which was unsurprising given the atrocities perpetrated.

> Very few victims of LRA abuses interviewed by Human Rights Watch in the camps expressed any desire for 'forgiveness'—many asked for 'punishment' of the commanders. One activist reported that the people of his community, Atiak in Gulu, would not be happy to have its native son, Vincent Otti, the LRA's number two, return home.

[42] They also noted that 'reconciliation', a necessary requirement to facilitate the return process, was far more widely aspired to than 'forgiveness'. The former was perhaps a more realistic aspiration too, in the aftermath of the widespread violence by both armed parties.

> […] A formal survey of attitudes of ordinary northern Ugandans and victims published in July 2005 reveals that many more than previously thought support prosecution of LRA leaders and some also want the UPDF held accountable for their crimes (76 percent). A majority of those surveyed wanted both peace and justice, and did not think they were mutually exclusive. (HRW 2005: 60)

Human Rights Watch were here selectively quoting from the influential ICTJ survey, which in fact overwhelmingly highlighted the community's immediate desire for food (33%) and peace (31%), relative to justice (less than 1%) (Pham et al. 2005: 4-5). The 76% figure used is in relation to whether or not individuals should be held accountable for their crimes, and was without regard to the practical issues implied by enforcement—the need for continuation of the war (ibid: 39).

There are multiple methodological issues regarding the survey. Amongst these were the nature of choices put to camp residents, in which for example, largely destitute people in considerable physical danger were asked to prioritise issues of feeding themselves and their families, or the provision of their security (from killing, abduction and other atrocities). Alongside this choice they were asked how they prioritised justice. However, the question was further complicated by issues of what 'justice' might mean in this context. The report fails to unpack the term 'justice' and properly define it; a curious oversight for an organisation promoting itself as having international expertise in the transitional justice arena, and a particularly grave error in the challenging linguistic and cross-cultural context of the survey in which multiple justice issues were apparent. In any event even without this clarification, and conflating all aspects of 'justice', the community did wish for it, including accountability for the LRA leadership,[43] but with less than one per cent naming it as their most immediate need.[44]

[43] This survey covered regions recently affected by the LRA's violence, and included extensive areas that had recently been relatively unaffected by the 20-year war. Some areas were outside the Acholi region, where the population had not been forced into camps by the Government and UPDF violence against civilians was far less common. Helpfully this distinction is made in the listing of responses in the report, but the far

Respondents were also asked to choose between peace with amnesty and peace with trials, and the results were used to indicate a balance of support for each approach. A more contextually relevant choice might have been between two different options: peace with amnesty; or peace attained through a war of sufficient length and ferocity to secure arrest and subsequent trials. This choice was not presented. With peace as a given in either option, people were free to choose between trial or amnesty. The options ignore the necessary means to attain peace with trials—sustaining the war, which was the antithesis of respondents' prioritisation of peace. Equally, the ICTJ ignore the role that amnesty might play in a strategic approach to securing peace by creating a route out of the LRA for most of its fighters. The profound strategic nature of that choice in the regional context, between peace through amnesty or through continuation of the war to secure arrest, is understood by the authors instead as a choice of justice methods alone. The survey results were interpreted as leaving plenty of scope for military-backed international criminal justice enforcement—a cause to which the ICTJ is institutionally committed (ICTJ 2009; ICTJ 2010), but to which the local community was according to their own survey clearly opposed.

The authors interpreted these ambiguous findings in a particular manner. Having removed the contextual issues of the required war of enforcement from

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lower levels of Government-backed violence in these areas is not fully acknowledged in the analysis, so the interpretation lacks some depth.

[44] The authors state that the de-prioritisation of justice 'does not reflect the overall importance attached to it' (page 25). It is not clear why the authors make this bold claim. The population's need for food and peace most immediately is clearly stated by respondents without ambiguity. Furthermore, the term justice in the report is used at times in its wide sense, and at other times indicating criminal justice, or even more narrowly international criminal justice for the LRA leadership alone. Given these considerable ambiguities, which would be all the greater in a cross-cultural context, the findings in relation to the ICC intervention should be treated with great caution. Additionally, it is instructive that when asked to prioritise issues after peace was attained, a majority of the IDPs prioritised being allowed to return to their villages. This is consistent with the view that displacement to the camps was experienced by them as enforced incarceration, and not their own voluntary response to the war which they might address themselves. It was an additional burden placed upon them that they wished to have lifted.

the survey when the questions were asked, and having been unclear about whether questions referred to broad concepts of justice or to narrow international criminal law enforcement, the relatively positive results secured through this abstraction could then be re-applied back into the specific context of the war where they clearly did not apply, thus achieving apparent endorsement of the military violence to which the affected community were overwhelmingly opposed. The ICC was recommended to disseminate more information about itself to assuage local concerns, and the issues of peace and justice (now reinterpreted as narrow criminal justice enforcement) were understood to be pursued together through the war, presumably as there was no other option. The ICTJ then, faced with people's overwhelmingly expressed wish for food, peace, and security as their most immediate needs (totalling 72%), made recommendations that led to the opposite—a continuation of the war in favour of criminal justice (with less than 1% support) (Pham et al. 2005: 25,42). At the ICC review conference in 2010 the ICTJ ignored all the inconvenient findings entirely, and summarised the local position in 2005 as being 66% in favour of hard options to deal with the LRA leadership, falling to 41% two years later. The locally overwhelming prioritisation by the affected population of peace and food was not mentioned (Otim and Wierda 2010: 6). Human Rights Watch then used this recommendation as an endorsement of the war to secure prosecution, and in this way also find support for their institutional position, thus 'displacing' human rights as Branch has observed (HRW 1998; HRW 2002b; HRW 2004b; HRW 2010a; Branch 2011).

From a more informed perspective on the conflict it emerges that peace and international criminal justice for certain perpetrators are not mutually exclusive in principle, but may require some contextual understanding to be achieved in practice (Armstrong 2010).

The Court's process sets the overarching requirement of the international community as the implementation of international criminal justice, and the trial of suspects. The ICTJ findings, contrary to their interpretation and despite the inadequacies of their methodology, indicate that the ICC is committed by its

Statute to very different priorities than those of the affected population. With such a stark difference in the priorities to those of the Court and the affected civilian population, situations in which the Prosecutor would have to choose between institutional commitments and an aspiration to be the Court of the victims will sometimes arise. Should this happen, the Prosecutor must select a course of action consistent with his/her institutional position: s/he may be obliged to set aside the immediate interests of communities, perhaps in favour of future populations as some have observed (Branch 2011: 209). Evidence indicates that the hope that the Court's interests would necessarily be aligned with those of the community were not borne out, even by 2005.

There is a strong case for arguing that this should have been anticipated? Approaches founded upon legal principles that set aside consequentialist considerations may become problematic in situations where thousands of lives are at risk. This issue is taken up in Chapter 7.

6.2.3 Failure to recognise the dynamic new context

If the issue of benefit to the community was problematic, there was at least the notion that the Court's intervention would make nothing significantly worse. The people were already suffering at the hands of both sides: the LRA was committing atrocities, the UPDF's tactics were already brutal, and the IDP camps were there regardless of the ICC's presence. Aside from the evidence presented above, if there had been no other efforts to end the violence then the Court might argue (though not un-controversially) that the international community, in this case on the basis of the Court's legitimacy, had a responsibility to act (HRW 2011b: 2).

But as we have seen in Chapter 4, the notion that there were no other significant efforts to end the war was not correct. Having dismissed the return process as finished by 2003, advocates for the Court had to explain why it was apparently gaining momentum in 2004, with the defection of significant

commanders with their fighters. In that year the number of amnesties claimed by returnees from the LRA rose to 5,000 (ARLPI 2004: 2; ICG 2005a: 2; ICG 2005c; ICG 2005b: 6; Rodriguez Soto 2009: 233; Allen and Vlassenroot 2010: 15). Numbers like this signalled a significant development in the conflict dynamic.

The Court's supporters proposed that this success should be attributed to the Court itself (Akhavan 2005: 417-418; HRW 2009b: 32). Thus when defections did not take place it was because the community efforts to foster return had failed, thereby legitimising the Court's intervention in a frozen conflict. When defections did take place (even before the ICC warrants were issued) and the process was increasingly successful, it was because of the effects of their own intervention, further legitimising their efforts.

Adducing the effectiveness of the Court from these observations rests upon a number of logical errors:

1. The failure to re-examine a conclusion, and inferences drawn, when contrary evidence emerges.
2. The failure to identify and assess competing possible causes for an observed effect prior to ascribing responsibility for that effect to one of them.
3. Adducing evidence for a belief from an observation, and later from the contrary observation, adducing evidence for the same belief.

Notably, both interpretations of events exist not just from the same author, but in the same article (Akhavan 2005). The independent academic peer review process did not apparently identify these logical issues internal to the article itself. It is disappointing that Akhavan was not required to provide evidence or explain the basis for this claim, though such instances are not isolated (see for

example the claims of the Prosecutor to the Assembly of States Parties (2006c).[45]

Community-based efforts to end the war were not the only structural changes taking place at the time, that have gone largely unacknowledged as impacting on the war. The signing of the Sudanese Comprehensive Peace Agreement (SCPA) in South Sudan nine months before the ICC warrants had been unsealed had dramatically changed the political and geographical context of the LRA's war (UNMIS 2005). The support of the Sudanese Government for the LRA from about 1993 is well documented—a tit-for-tat response to the Ugandan Government and Western support for the SPLA (Gersony 1997: 36-42). The SCPA significantly changed the LRA's political context (ICG 2005c: 3; Flint and de Waal 2008). At the same time it was also facing a transformed military scenario. The SPLA, with whom the LRA had clashed on many occasions, now had secured uncontested control of South Sudan and was no longer at war with the Sudanese army. The relative safety of territory held by the northern Sudanese army previously in southern Sudan, where the LRA could be based and could train abductees to fight, and where the Sudanese had been able to assist with logistics on occasion, was now much further north towards Khartoum (CR and QPSW 2006; ICG 2006a). Interposed between Sudanese Government territory where the LRA could be based, and the LRA's home area for operations and abduction in northern Uganda, were now hundreds of kilometres of SPLA-held enemy territory. The LRA's operational context was profoundly altered (Mwenda 2010: 56-57).

There were other respects in which the conflict dynamics may have shifted. After nearly a decade of LRA operations being launched from Sudanese territory, UPDF operations north of the Uganda border in Sudan had been facilitated by protocols between the two governments in 2002 and 2004, prior to

[45] Any assumption that the Assembly of States Parties and the Am. J. Int. Law were receptive audiences wanting to be reassured about the impacts of the Court and unprepared to critically examine the claims of its advocates would be inaccurate - a fallacy of type B above. However, it should be acknowledged as one possible interpretation.

the ICC's engagement. While LRA numbers had not apparently dipped in response to increased military pressure up to 2003, military activity in Sudan against LRA bases, which began in 2002, may have begun to have an effect (UNOCHA 2004; UNOCHA 2005a: 2; UNOCHA 2005b: 1). There was some speculation that by early 2005 the LRA had been significantly weakened (HRW 2005: 3; Rodriguez Soto 2009: 230-246). This is reflected in a presentation about the peace-through-return process given to members of the diplomatic community in Kampala by the author at the time (author's records).[46]

These factors—the strengthening return process, the changed political, military, and geographical context for the LRA, and military pressure from the UPDF, as well as the mass displacement of almost all the Acholi population—are all well documented, and they were all new. Additionally, by September 2005, before the ICC warrants had been unsealed, the LRA had already established bases in Garamba, DRC (Drew 2010: 25). The ICC was intervening in a dynamic situation in which numerous factors had recently come to bear. The perception of a frozen conflict in which all options had been exhausted fails to acknowledge the profound structural changes that had taken place in the previous few years. It was a new context.

6.2.4 Local concerns were well-founded and ignored

Fundamental practical and theoretical problems in relation to the Court's efforts to reassure the Acholi population have already been considered. The Court, having intervened in the conflict as a supporter of the Government's war rather than community-based peace efforts, and having interests closely associated with the UPDF's military campaign, was poorly placed to reassure the population about their concerns for peace and security. Evidence including

[46] I was presenting the local analysis, partly to support the case for stronger international financial support for the return process, given its local support, gathering momentum, and strategic nature. DFID and other donors did in fact back the process with additional funding, though this of course remained minimal relative to military spending.

extensive survey data, in-depth on-the-ground interviews and lived experience already presented demonstrates the UPDF had failed to protect people over preceding decades (4.3); was actively engaged in their displacement to the camps at the cost of thousands of lives (4.2); and despite this was explicitly entrusted by the Prosecutor with their security (5.1.3). There was clearly a danger that the Court's interest in furthering arrest might override considerations of civilian safety. Former Chief Prosecutor for the Bosnia and Rwanda tribunals Richard Goldstone anticipated such a possibility in general terms (McGreal 2007; 3.1.5), in order to move towards the 'era of enforcement' (Robertson 2006: ix-xxxiv).

A second fundamental point to make at this stage is that this study is not dealing in hindsight. Voices were repeatedly raised at a community level and elsewhere that anticipated the conflict dynamics and implications of the ICC intervention before the Prosecutor made the decision to intervene (Dolan 2000b; ARLPI and JPC 2001; HURIFO 2002; ARLPI et al. 2003; ARLPI 2004; Dolan 2005; Armstrong 2010). In February 2005, four years after ARLPI published its plea for people to be released from the camps, but nearly three months before the Prosecutor applied for his warrants and six months before the WHO/Ministry of Health published its mortality survey, this researcher's view from the ground was reported by CNN:

> '[The] ICC has committed a terrible blunder,' says Bryn Higgs, Uganda Programme Development Officer for Conciliation Resources. 'To start war crimes investigations for the sake of justice at a time when war is not yet over risks having in the end neither justice nor peace delivered.'
>
> According to Britain's UN Ambassador Sir Emyr Jones Parry the problem lies with the unfortunate timing of the ICC's investigation: 'This is about sequencing. First you need to put an end to the conflict and move into peace. After this comes justice and reconciliation.'

> Both are worried that the prospect of being convicted of war crimes at the ICC will drive the rebel Lord's Resistance Army away from peace talks with the Ugandan government.
>
> Bryn Higgs: 'The irony is that the ICC is there for a humanitarian purpose, it wants to discourage terrible impunities, but instead it pushes the LRA back in the bush and this leads to a continuation of the atrocities.'
> […]
> 'It's an ongoing humanitarian disaster,' says Bryn Higgs of Reconciliation Resources [sic]. 'Almost the whole farming community has been displaced. People in the region are destitute […].' (Volqvartz 2005)

The ICC entered the conflict despite the case put by communities and those working on the ground (Armstrong 2010). The government was a known perpetrator, and prior to the point of ICC intervention experts on the ground, as well as the communities themselves, were already predicting the outcome. These warnings were read and quoted prior to being disregarded (Akhavan 2005: 416).

Instead, legally sound but practically untenable assurances were offered to the populace by the Court and its supporters. The first of these is simple to refute. Stakeholders were assured that since the ICC's warrants applied to five commanders only, other LRA members could continue to return under the amnesty process (Akhavan 2005). This was true, but it ignored the strategic significance to the conflict dynamic of the five warrants, and the associated structural shift to militarily enforced retributive justice priorities (ICC 2005c; ICC 2005b; ICC 2005c; ICG 2005c: 1). As already indicated, and explored more fully in the next section, this change was profound. An leadership singled out by the Court for trial would (and did) lead, or more accurately coerce, its fighters back to the bush.

This assurance was also flawed because the ICC's efforts were accurately perceived as an effort to end impunity. As such they were associated with the government and Museveni's opposition to amnesty in favour of criminal justice enforcement (Branch 2004; Museveni 2005). The Court's efforts were not only ideologically counter to the amnesty process, but anticipated by the Prosecutor (and intended by the Government) to strengthen the military approach, as we have seen in 6.2.1 (Egeland 2008: 211; Rodman and Booth 2013). There were even some suggesting that the ICC might issue more LRA-focused warrants, which would have further undermined the return process (HRW 2010b: 11; HRW 2011b: 29-30). The ongoing government undermining of the Amnesty Law (and with it civil society efforts for peace) as described by Rodriguez Soto was further exemplified by the long-running issue of the trial or amnesty of Kwoyelo, promoted extensively in the government-controlled newspaper, the New Vision (Rodriguez Soto 2009; HRW 2010b: 49; Cakaj 2011: 9-11; Opongo 2011: 215; Talebpour 2012: 102). In this case the Ugandan Government and legal system vacillated over trial of a prominent LRA returnee who had escaped and sought amnesty (Cakaj 2011; Opongo 2011; Kersten 2014; Ogora 2016b; Ogora 2016a). Such prolonged public debate about whether the Amnesty Law could be overturned in his case served to damage the credibility of the entire amnesty process that communities had worked hard over many years to promote (Otim and Wierda 2010).[47] Similar dynamics have been observed by others (Armstrong 2010: 273-274). It is plausible that ICC and government actions to end impunity, by damaging the return process, could have served to sustain the LRA's numbers by discouraging return from the bush. Further research is needed in this area.

A more widely acknowledged assurance was derived from the belief that the Prosecutor might withdraw the warrants in the interest of justice. This notion, as promoted by Akhavan, depends upon an ambiguity concerning the term 'justice'

[47] The Kwoyelo case is continuing, and thus its impact on the amnesty process has been sustained https://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/ .

(see 5.1). Those on the ground seeking reassurance naturally interpreted 'justice' as concerning a just outcome for themselves, the affected community. The Prosecutor, as we have seen, also promoted this notion (Ocampo 2005b). But when engaging audiences elsewhere the Prosecutor was more explicit, explaining that 'justice' should instead be interpreted in a narrow sense that excluded consequential issues, such as the achievement of peace and other moral and practical considerations. The further implications of this position are dealt with in 6.3, but at this point it is important to note that justice for the Prosecutor concerned the application of the law. Applying the 'interests of justice' criterion thus sets aside the interests of the communities concerned (Ocampo 2007a; Ocampo 2007b). Akhavan, a prominent Professor of international law closely associated with the ICC's Uganda warrants, himself made statements to academic audiences revealing that although aware of the assurances offered, he was also clear that the interests of the people affected were subordinate to the interests of international criminal justice:

> Although it may be desirable to take into account the concerns of local communities, the constituency of international criminal justice extends far beyond this local level. (Akhavan 2009: 31)

So while the Prosecutor characterised the ICC as 'their [the communities'] Court', he was apparently aware that he might have to disregard their interests as they defined them, in matters concerning their survival (such as food, peace and security), in favour of the cause of future international criminal justice enforcement. Furthermore, some have emphasised that the setting aside of its first warrants would have been highly damaging for the new Court. Richard Goldstone again, an outspoken advocate for international criminal justice, had anticipated that even if Museveni were to grant a limited amnesty within the Ugandan State it would be 'fatally damaging to the credibility of the international Court' (and, one might add, the Prosecutor) for the Court to withdraw (McGreal 2007; Schabas 2007: 16). How much more damaging, then, the possibility of the Prosecutor himself withdrawing his own warrants? The notion that the warrants could be withdrawn in the interests of justice is legally enshrined; but

equally the option is almost completely prohibited by the circumstance of the warrants having been issued, lest the ICC itself be damaged. The assurances based upon it were always illusory (Articles 53, 61).

Assurance was also offered on the grounds that according to the Statute the warrants could be withdrawn for a period of 12 months, thus permitting local processes for reconciliation to come to fruition (see 5.1.5). This power resides with the UN Security Council (Article 16). Community leaders on the ground had no means to effect such a provision, even if they had had the backing of the Ugandan State. Without it, and with the opposition of the ICC itself, there was no prospect of their overturning the UN's commitment to the new machinery of international criminal justice. Such a provision would need to be indefinite in order to reassure nervous LRA commanders of the wisdom of laying down their arms. The possibility that this provision could be enacted not once, but annually as would be necessary, and that such a feat could be secured with sufficient certainty to influence the LRA command to believe that the warrants were no longer an active threat, stretches well beyond the implausible. Yet despite this a number of commentators have cited the notion that the 12 month suspensions of the warrants might help to ease the negotiation process (Grono 2006). None has addressed the central issue of why warlords with an active army might permanently relinquish their security through talks in favour of a twelve-month suspension of arrest. Without supporting reasoning, these arguments are flawed. The warrants, once issued, became an intractable feature of the conflict (Hovil and Lomo 2005; Souare 2008: 109).

The situation was one in which security of the civilian population had been put in the hands of a perpetrator of multiple crimes against it, and where divergent justice priorities and beliefs were coming to the fore. Sensing local concern, but failing to understand the divergent interests of the Court and the affected population in this perilous scenario, some international observers wrongly assumed this popular unease was principally due to a lack of understanding about the benefits of the ICC's engagement. They advocated that local concern

about safety from mass violence associated with the Court's intervention could be addressed through outreach work alone (HRW 2005: 56-57 quoted in 5.1.5). For those who identified the problem as essentially one of local mis-perceptions or lack of information, the solution lay in explaining the remit, purposes, and good intentions of the international institutions concerned, allied with the Government and military. Even Court strategy documents seem to have been influenced by this belief (ICC 2006b: 3). The ICG articulated these issues as follows:

> The Court risked becoming the target of recriminations from humanitarian groups and Acholi community associations, whose overriding interest was to give negotiated peace a chance, even at the cost of [prioritisation of retributive international criminal] justice [for the most prominent perpetrators on the LRA side]. Spokespersons for northern Ugandan civil society groups, traditional leaders, local politicians and religious leaders argued in a joint statement that, 'the ICC should suspend its investigation and refrain from planned issuance of arrest warrants until peace is achieved in northern Uganda'.
>
> Instead, they suggested, 'the ICC must first engage in a public information program to create awareness and to popularise their role among the local community in northern Uganda and the whole country . . . so as to be better understood.'
>
> The Office of the Prosecutor responded constructively with a campaign to improve understanding of the ICC among the concerned communities and groups. It invited a search for common ground around a more comprehensive and collective response to the conflict, received a delegation of Acholi traditional, religious and civil society leaders and local politicians at The Hague in mid-March and expects to receive another large delegation of local officials in April […]

> This dialogue has offered the Prosecutor an opportunity to explain the ICC's responsibility under the Rome Statute to investigate and prosecute serious international crimes, taking into account the interests of victims and justice. By indicating that the investigation is concentrated on those senior commanders who bear the greatest responsibility, he acknowledged that traditional and national reconciliation and justice processes also have a vital role to play in achieving accountability. The open discussion of concerns, responsibilities and limitations that is now underway with communities throughout northern Uganda appears to be resolving initial misunderstandings and can produce a better coordinated, mutually reinforcing accountability effort. (ICG 2005c: 5-6)

Thus, with research indicating priorities such as peace and release from the camps on the minds of the community, and the ICC's warrants intended to defer peace and legitimise pre-existing UPDF military action against the abductees, it is not clear how these meetings might allay their fears. Given the divergence of interests between the Court and civil society, this was a weak strategy, as will become apparent. The issue of the mechanisms by which communities may put their case, when faced with the prospect of militarised enforcement of international criminal justice and prolonged violence against them, will be returned to in the next chapter.

It is clear that the affected population should have been alerted to the Prosecutor's position, as indicated by his own statements to other audiences: that the 'interests of justice' upon which his judgement rested concerned a narrow set of issues relating to the furtherance of criminal justice rather than humanitarian considerations (Ocampo 2007b); that broader practical and consequential justice matters such as people's access to food or peace were beyond his remit (Ocampo 2007a; Branch 2011: 208-209); that the enforcement of warrants promoted the legitimisation of UPDF activity including the killing of further 'victims'/abductees (see 4.3); and that in other circles it was broadly

understood, including by the Prosecutor himself, that the interests of international criminal justice might necessitate some sacrifices on the part of communities affected by violence for the greater good internationally in the longer term (McGreal 2007; Branch 2011: 207-215). With these clarifications it is not clear how reassured they might have been. The Court's outreach programme did not extend to these pertinent issues.

The Prosecutor's engagement with the local community leadership has been emphasised, and his accounts indicate the number of visits made and the extent of the discussions (Ocampo 2005b: 3; Ocampo 2006c: 16; Ocampo 2007b: 6). The substantive issues relating to the divergent interests of the affected population and the Court were irreconcilable: the one wished to see an end to the violence as a first priority; the other sought enforcement of arrest warrants which required its continuation. These efforts thus culminated in a joint statement in April 2005, which communicated little of substance, but by its issuance lent legitimacy to the Court's intervention. With no bargaining power at their disposal, the community leadership secured only the continued line of communication to the Court through which to plead their case. The statement smoothed the way for the imposition of the Court's will, with or without community support, while the extent to which the interests of these two parties had diverged was revealed, not by discord, but by the rudimentary nature of the points upon which they could agree (ICC 2005e).

Security remained a further issue of concern. An even-handed consideration of the problem of witness (or community) protection, as described in the Statute, should emphasise that it is outside the Court's power to grant absolute protection to the communities from the effects of the war. This level of security was not available to them prior to the ICC's intervention, and it would not be reasonable to expect it to be delivered by the Court's activities. It is important, though, that the Court should carefully weigh up whether its actions increase the risks faced by communities. In this context it is concerning that the language of the Statute implies 'witness protection', as if attacks may be limited to specific witnesses alone (Article 68). Actors in conflict-affected regions may

not feel obligated to deliver their retributions, or warnings, to the individuals concerned. A witness or group of witnesses may be silenced by an indiscriminate attack, delivered and understood as a warning. This behaviour was exhibited by the LRA itself. There were instances of relatives being singled out for execution (HRW 2005: 58), but it was not necessary for the LRA to locate individuals as they could administer collective punishment. Accounts of their atrocities include instances of individuals killed as collective punishment, even for the perceived misdeeds of the Acholi people as a whole (Gersony 1997; Allen 2006b). Thus, aside from the concerns about the UPDF's own violence against the population, it was not able to deliver protection from such LRA attacks in the past, and it was not reasonable to expect that situation to change. The Court was thus operating in an environment in which both Government and LRA might commit violence against the civilian population, and LRA violence in response to the Court's activities could not be prevented. The Prosecutor faced difficult decisions in relation to witness protection, because it was clear that witness (or community) protection could not be achieved. As noted in 6.1.1, he observed the risks taken by some in telling their story to be 'tremendous' (Ocampo 2007a: 9).

In conclusion, far from being closely associated, the interests of the Court in effecting arrest were linked to the military process of fighting the LRA, who largely comprised abductees. The interests of the affected population were clearly in survival, both of themselves and their abducted relatives, under the principal threats of camp life and violence of both sides (HURIFO 2002; Branch 2011: 208). The portrayal of the Court as being dedicated to the victims of the conflict does not reflect its conduct or strategy, reliant as it was on violent enforcement by the UPDF. In this instance the Court was not 'their Court', but one committed to the political and military instruments necessary for the enforcement of international criminal justice, as determined by the strategy of the Prosecutor. The ICC was instrumentalised as the Ugandan Government's court, against the other two parties to the war: the LRA and the civilian population (Branch 2007b; Rodman and Booth 2013).

The emergence of differing Court and civil society interests was associated with a competitive relationship between the two. Community peace-building efforts offered a challenge to the military process of apprehending the suspects; an alternative vision for how the conflict might be resolved through bottom-up dissolving of the LRA forces back to the civilian life, rather than top-down decapitation achieved through a lengthy war of attrition. Peace through return and reconciliation challenged the Court's enforcement paradigm and retributive view of justice.

If the misalignment of the ICC's interests with those of the people had become increasingly evident on the ground from 2002 onwards, the extent of their divergence was not apparent internationally until the close of the Bigombe process in 2005, and the Juba peace talks from 2006. This is the focus of section 6.3.

6.2.5 Local peacebuilding and justice strategies overruled

As has previously been indicated, researchers have identified differences in conceptions of justice held by the (Acholi) community and external criminal justice interveners (Pain 1997; Baines 2003; Baines 2007). Others have challenged this point, as if by refuting the idea that community reconciliation processes were 'authentic' or by disputing that the community was homogenous in its desire for peace over retribution, the case for a community-based approach to addressing the war would be weakened (O'Brien 2007: 1; Allen 2010). A number of observations can be made about these perspectives.

Community-based concern about the ICC's intervention was certainly due partly to different local and international concepts of justice, and a weaker local commitment to a retributive system as Baines outlined. But within the Court's specific justice frame, the situation of northern Uganda presented a particularly problematic case. The history in Uganda of inter-ethnic violence was decades

or centuries long, and had been fuelled by bouts of retributive justice-seeking. Communities felt themselves to be the victims of atrocities, which indeed they were, but often failed to adequately recognise the deeds perpetrated by their own members against others. The path towards justice for each had involved retribution meted out against one another, with the result being mutual mistrust, fear, and occasionally inter-ethnic violence (Gersony 1997: 7-14; Museveni 1997; Mwakikagile 2013). The ICC resolved this (at least in theory) in an arbitrary manner according to its Statute, by sustaining the retributive element but considering only the period since its founding in 2002. During the recent period of the LRA war, community approaches to addressing inter-community justice issues took a longer view and sought to limit the retributive element, instead adopting methods more reliant on dialogue and the rebuilding of relationships (widely observed by the author, but also shown in for example Pain (1997), ARLPI et al. (2003), and Baines (2007)). Given the prevalence of perpetrators on all sides and the effect of military enforcement in delivering only reciprocal bouts of violence under successive regimes, local methods may not only have been a cultural preference, but a pragmatic and humanitarian necessity. Inter-community reconciliation efforts during the previous decade had reflected this belief (author's observation).

In the conflict-affected area, similarly pragmatic choices were at play. Situated between two violent military forces, each with a history of killing, torture, rape and victimisation of the population, local community advocacy for peace through return and amnesty, and tolerance of returnees, was in part pragmatic. It has been clearly established that neither armed party to the conflict represented the community interests, and that the strategy of each side to win the war (and mete out retribution against the other) involved killing civilians or depriving them of the means to live. As some have argued, those who observe the affected population to be equivocal about forgiveness are missing the point (Branch 2011: 207-212). The case for amnesty and return was led by the community, and sought to acknowledge and harness local ideas of justice that included retribution, tolerance, reparation, and forgiveness. But, unlike the campaigns of the LRA and UPDF, it was a pragmatic approach to ending the war that did not

involve killing civilians. People had little choice—an end to the violence necessarily entailed acceptance back amongst themselves of those who had been in the LRA, despite their involvement in atrocities. To reject them was to push them back to the LRA, and risk further violence. But most of these individuals were also the abductees, and many or most people understood the complications of their innocence and guilt. The case for a civil society-led approach to justice never rested upon cultural authenticity, nor on philosophical considerations of justice alone; nor on unquestioning adherence to a Western retributive model, or an exaggerated enthusiasm for forgiveness even of the most vile crimes. Instead, the case relied significantly upon local communities understanding the history and dynamics of their own conflict, their views on justice beyond retribution, and their agency in relation to the resolution of the war. Fundamentally, it rested upon their understanding the prevailing constraints and being able to determine their own solutions (Mani 2002; Branch 2004; Branch 2007b). It was this approach—contextually informed; participative; sophisticated; complex in its understanding of justice; incomplete and imperfect; highly practical; inexpensive; non-violent; locally led; and apparently increasingly successful, that was anathema to the LRA, the Government, and the ICC.

From 2005 onwards the conflict dynamics revealed the divergence of community and international criminal justice interests even more starkly. The course of the conflict more clearly illustrated the Court's ability, through its warrants issued against a small number of individuals, to wrest power from local (and national) leaders and decisively to determine that certain paths to conflict resolution be discontinued. These developments are outlined in the next section.

6.3 The ICC's profound impact on talks

The fundamental problem facing calls for international criminal justice in the context of peace processes is that those most responsible for atrocities may

well have influence on the talks or hostilities themselves. Setting a requirement that these individuals agree to their own arrest as a binding condition for the successful conclusion of talks risks further violence. Yet the notion that insistence on trials for the LRA leadership might be an obstacle to peace negotiations was opposed by supporters of the Court's intervention in relation to the Juba process. As previously shown, claims made for the Court included assertions of its role in precipitating the talks in the first place, the unlikelihood of the LRA engaging constructively in any negotiation process, and the numerous alternative reasons to which failure could be attributed (see 5.2). This assessment was sustained throughout the period of the talks, and after their collapse. It was strengthened at the ICC Review Conference in June 2010 (AI 2004; HRW 2004a; HRW 2005; AI 2006; HRW 2010a; ICC 2010a; ICC 2010b; ICTJ 2010). The next section argues that this interpretation of events was not made on the basis of evidence or sound reasoning, and though widely asserted and disseminated, it does not hold up under careful scrutiny and is clearly untenable (Afako 2010; Armstrong 2010).

6.3.1 The ICC precipitated the collapse of the Bigombe process

The efficacy of the ICC in relation to Ugandan peace processes was first asserted prior to the commencement of the Juba talks; indeed, over a year prior even to the ICC's issuance of warrants. The Ugandan Government referred the situation to the ICC at the end of January 2004. Before the Prosecutor announced that there was a case to answer in June, that is, before the ICC had engaged, Akhavan claims that Sudan had ended its support for the LRA and signed the March 2004 protocol in part as a result of the ICC intervention (Akhavan 2005: 404). Both elements of this assertion seem doubtful. Even two years later, from 2005 to 2006, observers were suggesting that Sudanese support had continued, including the ICG, who suggested that the withdrawal of the Sudanese army from the Juba area in May 2006 caused the links to be severed (ICG 2006b: 5; ICG 2007: 11; Rodriguez Soto 2009: 250-251). It is not clear even then that Sudan had ended its support for the LRA. Secondly, even

if it had, no evidence is offered for the astonishingly bold assertion of the ICC's potency in this respect. The claim is all the more surprising when the context is understood. The protocol which Akhavan claims was a result of ICC engagement was in fact an extension of the previous protocol signed in September 2003. Furthermore, that one was itself preceded by one in early 2002, following the resumption of diplomatic relations between Uganda and Sudan in 2001. These developments took place well before the establishment of the ICC (Lucima 2002: 91-93; Neu 2002; UNOCHA 2003: 1,11; Drew 2010: 24-26). Akhavan makes no mention of these precedents, nor explains his reasoning for why the 2004 protocol renewal required ICC intervention when its predecessors did not. These agreements may have influenced the conflict, but there is no evidence that they are linked to the ICC's engagement, which to a large extent came afterwards.

Undeterred by the sequencing issue, this claim was then used by Akhavan to attribute the strengthening return process to the ICC (a claim without evidence, as established in 6.2) and to the military successes promoted by the Court's engagement (notwithstanding the implication that the ICC would thus be associated with the deaths of the abductees as discussed above). Further asserting the effects of the referral, he also made a claim about the origins of the Bigombe peace process by stating that the referral 'forced otherwise defiant leaders to the negotiating table' (2005: 404). Bigombe had travelled to southern Sudan seeking to further her talks process in June 2004, even before the Prosecutor announced his investigation (ICG 2005c: 3). Only the referral by the Ugandan Government itself preceded the Bigombe process. No evidence is offered for the ICC's rapid and decisive influence. It is conjecture.

It is surprising that before the Juba talks process had come into being, and before the ICC had started to investigate, the Court was credited with such powerful international influence. Yet no evidence for this dramatic assertion was considered necessary. After the signing of the Uganda-Sudan protocol, and the surge in the community-led return process, the claim for responsibility for the instigation of the Bigombe process was a third instance of the assertion

of positive impact supported neither by evidence nor, some might add, plausibility. It was also the first claim for the ICC of having brought rebels to the table, but not the last.

Yet the ICC did have influence on the Bigombe process, albeit negative, at least according to Bigombe herself. In February 2005 Bigombe indicated that she would end the mediation if the Prosecutor insisted upon issuing arrest warrants. (Pham et al. 2005; Ross 2005; Pham et al. 2007; ICTJ 2009; Allen 2010). As the LRA had always asserted that they would under no circumstances offer their leadership up for trial, and as the position of the Court had always been that talks must deliver them to trial, mediation post issuance of warrants was always problematic. No analyst has articulated a post-warrant narrative for talks that would deliver the LRA leadership into ICC custody. Indeed, one can argue that successful peace talks would pose a significant threat either to the LRA (through arrest) or to the ICC (through failure to arrest). Both parties, on the other hand, could continue to coexist if the war were to be prolonged. In the absence of the possibility of a negotiated settlement that would be acceptable to the ICC and the LRA, continuing the violence may have been tolerable or preferable for both, because it sustained the possibility for each that their will would prevail over the other. Trials (anathema to the LRA), and impunity sanctioned by a peace deal (anathema to the ICC), could both be avoided.

Despite this clear line of reasoning, and the threat to talks that warrants would pose, Bigombe's insistence that the Court should hold back was interpreted by the ICC as 'unnecessarily provocative' according to the ICG (ICG 2005c: 5). Failing to understand the opposing interests of the Court and the affected population, the ICG overlooked the problem, stating '[…] the ICC is well aware of the risk and is undertaking a series of activities which have increased mutual understanding with northern Ugandan civil society' (ICG 2005c: 1). Addressing the superficial issue of mutual understanding was now somehow expected to address the structural problem that warrants would scupper talks. Shallow international analysis trumped both local knowledge and compelling logic.

Events during subsequent months unfolded as many local observers expected: in March 2005 Bigombe's peace efforts were as before obstructed by the Government (ICG 2004; Rodriguez Soto 2009: 230-246)[48]; and in May, the Prosecutor applied for the warrants, which were issued in July and unsealed in October (ICC 2005b; Ocampo 2005b; Drew 2010: 25). On receiving this news Bigombe stated: 'There is now no hope of getting them to surrender. I have told the Court that they have rushed too much' (New Vision 2005; HRW 2009b: 30). The warrants precipitated the talks' immediate collapse.

One cannot draw the conclusion that the ICC destroyed the talks; many factors were at play, and the talks might well have failed in any case. But with the warrants issued their failure was assured. The question that remained was whether it was simply the Bigombe process that was finished, or the possibility of a negotiated peace *per se*; the answer to this question emerged through the Court's response to the Juba process itself.

6.3.2 No evidence of positive impact prior to the Juba process

Despite, or perhaps because of, the incompatibility of the Bigombe process with the Prosecutor's warrants, supporters of the Court were keen to assert that peace-making and arrest warrants were compatible.[49] One original claim, because of its bold nature and the influence it has had, merits restating (it was more fully quoted on p49) and deserves specific attention, and refutation:

[48] Rodriguez, who was present in the region at the time of the previous Bigombe process in 1994, articulates his view, and the widespread local perception, that Government pressure caused by a hastily imposed seven-day ultimatum imposed upon the LRA contributed significantly to the failure of peace talks at that time.

[49] Assertions such as the local belief that peace and justice are compatible, by HRW and ICTJ for example (see 6.2.2), deploy the now familiar device of using the term 'justice' as a double entendre, making the self-evident (though simplistic) claim with reference to its wider meaning, while later using it to endorse the narrower purpose of retributive military criminal justice enforcement. The local belief that peace and justice are compatible is reasonable. The international assertion that peace and military enforcement of international criminal justice priorities in the LRA war context is compatible, is not.

> Thus far, the empirical evidence suggests that international commitment to the referral's success has contributed to the LRA's incapacitation. Sudan has been persuaded to end its support for the LRA. (Akhavan 2005 p404)

The passage goes on to assert multiple inaccuracies already discussed. There is no evidence that the ICC contributed to the renewed protocol with Sudan (section 6.3.1 above). There is no evidence that the ICC was responsible for encouraging the return process (indeed there is some evidence to the contrary); and as previously stated this claim is beset with logical fallacies (see 6.1, 6.2.3, 6.2.4). There is evidence that ICC warrants precipitated not the commencement but the collapse of the Bigombe talks (6.3.1). LRA violence against civilians increased in the first half of 2005 while the Prosecutor was investigating, when deterrence should in theory have caused it to fall (see 6.2.1), and indeed there was a return of the LRA's intermittent practice of mutilation (UNOCHA 2005a). Later, after the referral with the ICC fully engaged, mass atrocities peaked at levels higher than ever (6.2.1).

What remains to refute, and what may have contributed to the widespread dissemination of these unfortunate misperceptions, is the claim of empirical evidence. The reference offered is the UNOCHA Consolidated Appeals Process 2005 report, published in November 2004, which contains empirical data, but does not provide evidence for the ICC's impact. In fact, on the contrary, it indicates local concerns about the ICC's effect on the peace process (UNOCHA 2004: 6-7). Furthermore, its subsequent mid-year report indicates that the ICC had complicated the search for peace against the wishes of local representatives, and that violence had increased following the collapse of the Bigombe talks. UNOCHA itself indicates the Court's negative impact for peace and community priorities (UNOCHA 2005a: 2). Akhavan's suggestion that the referral was a success was not grounded in evidence, empirical or otherwise. It is regrettable that these unsupported claims have been so widely referenced.

These issues are discussed in more detail elsewhere (article by the author under revision prior to resubmission).

There was a further claim by the Prosecutor in November 2006, widely repeated at the ICC review conference in 2010 (author's observation), that the UPDF backed by the ICC was in significant part responsible for the LRA's move of its headquarters to the DRC (Ocampo 2006a: 2; HRW 2011b: 29). This is also un-supported (6.2.3). No evidence is provided for the view that it was UPDF operations or the ICC influence, rather than the transformed situation in Sudan or the Ugandan return process (4.4, 6.2.3). The LRA had entered north-eastern DRC by September 2005, before the ICC warrants were unsealed in mid-October (ICG 2006b: 5). Additionally, whether the LRA's move to the DRC was positive or negative in relation to its impact on civilian populations and efforts to end the war is questionable, and not discussed. The principal means of depletion of the LRA, the return process, (4.3.4), was not operational in DRC at the time, while civilians remained endangered in the new context: the LRA continued to perpetrate atrocities and abduct.

In summary then, no evidence is provided for the various claims for positive ICC influence prior to the Juba talks. The rationale for these claims is not expressed or tested, and alternative explanations more apparently consistent with the events and their timeframe are never mentioned. Because the presented narrative is not based on data, the claims made for the Court are best understood as advocacy work on its behalf, rather than informed situational analysis. It is regrettable that in both academic and policy circles these views have largely supplanted evidence-based analysis which draws upon amnesty figures, survey-based results, and the lived experience from the community level (section 4.4).

6.3.3 The ICC did not bring Kony to the negotiations

The notion that the ICC brought, or played a significant part in bringing, the LRA to the negotiating table in Juba has been thoroughly analysed as an element of this research, and previously submitted for publication as a journal article (now pending resubmission). Some key elements of that analysis are now highlighted. The literature contains multiple assertions of this idea, from eminent individuals and institutions with considerable standing, including those referenced here (Schabas 2007; AI 2008; Apuuli 2008; Grono and O'Brien 2008; Otim and Wierda 2008; Souare 2008; Akhavan 2009; HRW 2009b; ICTJ 2010; Schabas 2011). In order to investigate this view the referencing of each occurrence (not limited to those above) was traced back through its sources to the preceding claims. By following each claim to its origins, it was possible to identify the principal primary proponents of this view, and reveal the evidence base for their analysis (Akhavan 2005; Egeland 2006; ICG 2006a; Ocampo 2006a).[50]

In the event, none of the sources presented critical analysis. Of the original sources, the Prosecutor's claim might be regarded as an advocacy message as it was given verbally without accompanying analysis (Ocampo 2006a). Akhavan's claim fails to proffer evidence (2005). The third was an un-supported statement, referenced in subsequent publications by the same organisation, as if providing evidence of more than a prior assertion (ICG 2005c, 2006a), while the fourth from the UN's Under-secretary General, was an equivocal verbal statement, misconstrued as supportive of the notion (Egeland 2006). These issues are fully discussed in the article.

The analysis presented in this Section has already indicated the profound changes taking place in the conflict at this time. Yet none of the sources identify this, nor the assumptions underlying the assertion of ICC efficacy, and none of them supply evidence for it. None of them weigh up alternative

[50] Scholars will observe that one of these references predates the Juba talks, though it was later widely construed as applying to the Juba process which followed.

possible reasons for the LRA to have attended talks, for example the advent of peace in southern Sudan and the transformed political and military context, the military pressure that the LRA was under from UPDF and then also the SPLA, or the return process and defections that were by that time taking place. Claims were made for the ICC's role in promoting military pressure, but these articles and statements make no attempt to critically examine this notion.

All that can be found is some evidence that the LRA commanders were influenced to engage in talks in part to have the warrants lifted. Unfortunately, as ICC withdrawal was not a possibility, this plausible impact provided no options for a peaceful settlement (6.3.1). Despite the lack of a basis for this belief, the idea that the ICC somehow contributed to the instigation of the Juba process is widely disseminated by supporters of the Court as if it were more than conjecture. Today, scholars wishing to present a balanced view now feel obliged to repeat this notion based on the weight of literature repeating it, as if there were evidence on both sides of the argument (Talebpour 2012: 103-104).[51] This is not the case. A community of belief has formed around this dubious contention, which is now disseminated uncritically.

Akhavan's unsubstantiated claim that the referral was instrumental in the creation of the Bigombe peace process, which collapsed with the issuance of the warrants, has become influential again for the Court's credibility at Juba (5.2.2, 6.3.1, 6.3.2). Yet further arguments remain to be considered in defence of the Court's intervention in Juba, prior to drawing any conclusions about their collapse.

6.3.4 ICC engagement during the talks helped prevent a deal

In April 2005 the International Crisis Group made a clear observation regarding the LRA commanders' requirements of negotiations for themselves:

[51] Talebpour's thesis is a case in point. Unfortunately and additionally, Afako is misrepresented here as supportive of the Court's engagement.

> Kony will not agree to a ceasefire that does not address the LRA's two central concerns—[LRA commanders'] post-settlement physical security and livelihoods. (ICG 2005c: 1)

None have challenged this observation in the literature. Yet if it is true the issuance of ICC warrants later that year rendered not only the Bigombe talks, but also the Juba talks redundant. Through the warrants, the region would be committed to war.

Having refuted the claim that the Juba talks might not have taken place without the ICC, and observed that the warrants would not be withdrawn, (5.2.1, 5.2.2, 6.3.2, 6.3.3), this study now considers the two remaining assertions: that the ICC had no impact in relation to the collapse of the talks because they were always bound to fail; and that their failure could have been for multiple reasons other than the intervention of the Court (5.2.3).

6.3.4a Preparations for war took place on both sides

The arguments put forward by supporters of the Court that the Juba talks were always bound to fail focus upon the LRA, despite the Government's record of repeated disruption of peace efforts as discussed in Chapter 4 (Rodriguez Soto 2009). The notion that the LRA was preparing for war and was thus not negotiating in good faith is founded upon a logical flaw: that such preparations necessarily indicate bad faith. The preparation for both scenarios does not in itself indicate a preference for one over the other. In this case, from early to mid-2008 the talks were clearly faltering, and the LRA was observed to resume abductions and be in receipt of weaponry (BBC 2008; Izama 2008). Yet they were not the only party carrying out preparations for war: the UNSC backed further efforts for talks in December 2008, while preparations for an international military offensive were underway (Kersten 2012). Then on 14th December SPLA, DRC and Ugandan forces, backed by the international community including the US Africa Command, launched Operation Lightning Thunder in an

attempt to decapitate the LRA, while putting a decisive end to any lingering hopes of dialogue. The LRA bases were destroyed with overwhelming force in a surprise ground and air attack (HRW 2009a: 28-29; Schomerus and Tumutegyereize 2009).

Clearly military preparations and plans were being drawn up for this attack even while the Ugandan Government and international community were simultaneously engaged in the talks, apparently in good faith. Both sides were preparing for a resumption of the war while negotiating. It is not logical to draw opposite inferences concerning Government and LRA intentions from the same behaviour.

6.3.4b 'Kony was never serious about peace' is conjecture

The misguided suggestion that the preparations for further conflict were a sign of negotiation in bad faith has been linked to the wider claim that Kony was never serious about peace, as Rodman and Booth note (2013: 295). This may be the case, though it is pertinent that both Bigombe peace processes ended after decisive Government/ICC interventions (4.1.6, 6.3.1). Furthermore, the idea that Kony's lack of interest in peace was demonstrated by the failure of preceding attempts to negotiate with him suffers from another error of logic. Peace negotiations only take place where preceding efforts to resolve a conflict have failed. The argument that talks should not be used or are bound to fail because preceding efforts have failed, is an argument against peace talks *per se*; an extreme position indeed. Additionally, the failure of peace talks does not imply that one side or another is not serious about peace, nor that one side was serious while the other was not. Nevertheless, it is important to acknowledge that the preceding failure of talks is consistent with the view that Kony was never serious about negotiations. The problem is that it is also consistent with the view that the Ugandan Government was not serious about talks, or that both sides were not serious, or that both sides were serious but unable to come to an agreement (Kersten 2012). It is another a speculative assertion by supporters of the Court.

On both counts then, the claim that, aside from the impact of the ICC, the Juba talks were moribund from the start is not supported.

6.3.4c The ICC warrants ensured the talks would fail

There remains now only the observation that there were many possible reasons for the Juba talks to fail, and thus no reason to suppose that the ICC's warrants were of particular significance in relation to their failure. Though apparently powerful, this notion fails on two counts. The first is that the LRA leadership itself indicated that they would under no circumstances sign a deal that delivered them to a trial (Fisher 2006). The issue was a very significant obstacle to the talks and has been cited as the ultimate reason for their failure (Eichstaedt 2008). In this context, the Ugandan Government even considered requesting withdrawal of the warrants in favour of national and local justice mechanisms; however, the Prosecutor clarified that this was neither legal, nor acceptable to the Court (Ocampo 2007a; Ocampo 2007b; McGreal 2008; Museveni 2008; Ssenyonjo 2008).

6.3.4d The arrest warrants precluded successful negotiations

Supporters of the Court's intervention hold that the warrants did not preclude the possibility of successful negotiations. They knew that the ICC would not withdraw the warrants, and held that it should not. They also knew that the LRA leadership had stated that it would not sign a deal that delivered itself to trial. By logical deduction then, if in their view the warrants did not preclude successful talks, they must have believed that the LRA leadership was or would in fact be willing to go to trial after all; that it was lying or deceiving itself when it said that it would not. Even before the evidence is applied, this seems a curious belief.

In the event, it was the issue of ICC warrants that the LRA identify, and evidence indicates, was a very significant stumbling block. In the final analysis Kony himself stated that it was the warrants that made a deal impossible (BBC

2006; Fisher 2006; Eichstaedt 2008). In this context supporters of the Court have failed to articulate why the LRA might lie about such an issue. None have suggested a scenario in which the LRA leadership was willing to go to trial, but unwilling to say so. In the absence of any plausible articulation of an alternative view it seems that the LRA leadership were in fact telling the truth. They undoubtedly were not prepared to deliver themselves for trial.

This may seem self-evident, but the rationale for the dominant narrative's view and the Court's assertion that it did not ensure the failure of the Juba negotiations, rests upon believing the opposite—that the LRA leadership might through talks deliver itself to ICC trial despite their assertions to the contrary (HRW 2009b: 30-33). Post issuance of the warrants, with the insistence of the Prosecutor that talks must subsequently deliver a trial, and LRA high command's bottom line that they would not, the Juba peace negotiations were finished before they started. The 2005 observation by the International Crisis Group, aligned with the views of many local observers, was of course still correct (ICG 2005c: 1; Rodman 2012: 68).

Just as the warrants underwrote the collapse of the Bigombe talks, whatever other issues they faced, so too they ensured that the Juba process could not succeed. Far from having an uncertain impact, Juba was the second instance *from the same case* in which the evidence indicates that the ICC precluded the possibility of successful peace negotiations. While there is only conjecture concerning other obstacles to peace, it is clear that the warrants ensured the failure of talks from the outset.

By this stage, the interests of the Court in ensuring a return to the war of enforcement that could one day lead to arrest, and of the community in seeking peace without the killing of the LRA abductees, were diametrically opposed. In the prevailing context of LRA refusal to go to trial, the ICC's engagement committed the region to a war in which the community was the major victim of both sides.

6.3.5 Court interests prioritised over community rights

Although the Prosecutor's rhetoric of alignment of the Court with the interests of communities experiencing atrocities continued even beyond the Juba process (ICC 2010a; Ocampo 2010b: 6,16; Ocampo 2010a: 6,11), his communications during the talks clarified in a much more public way how the Court would prioritise its activities when the interests of international criminal justice prosecutions conflict with those of affected communities. In June 2007 he stated:

> It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace. Allowed to remain at large, the criminals exposed are continuing to threaten the victims, those who took tremendous risks to tell their stories; allowed to remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield. (Ocampo 2007a: 9)

Enforcement, through the war on the LRA, though it was made up principally of abductees, was apparently the way to enduring peace. The prevention of abduction was still not an emerging issue, while direct threats of violence by the LRA to the local population would not deter the Court. Three months later, the Prosecutor strengthened this position in a written paper, stating the following:

> The situation of Uganda has perhaps attracted the most attention, given the attempts by various parties to resolve the conflict between the Government of Uganda and the LRA. This situation demonstrates well the exceptional nature of the provision on the interests of justice as well as the differences between this concept and the interests of peace.

> With the entry into force of the Rome Statute, a new legal framework has emerged and this framework necessarily impacts on conflict management efforts. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law. (Ocampo 2007b: 4)

Bound by its Statute, threats of violence to the community even including anticipated future atrocities that might be associated with its own intervention must be ignored by the Court because of their moral and practical nature. Regrettably, such consequential considerations fall clearly outside the parameters of prosecutorial concern in furthering ICL. The militarily backed application of the legal imperative has perhaps led to far more violent consequences than were anticipated by the architects of the Court, even if they were clearly anticipated before the arrest warrants were issued.

6.3.6 Conclusion in relation to the talks

With the misalignment of interests of the ICC and the people on the ground established, the Court emerged not as an advocate for their interests, but as a fourth party to the conflict with its own priorities and perspectives. At Juba it revealed itself as the third party, after the Government and the LRA, with pre-conditions to be met before the violence could end—principally the apprehension of the ICC suspects. This requirement was encapsulated at the Review Conference in 2010, when the slogan 'No peace without justice' was widely promoted (author's observation). The possibility of peace without arrests had been averted, and through the continuing violence (though ineffective in relation to achieving arrest), the Court had in its own terms succeeded in preventing impunity through talks, by ensuring that it was not enshrined in the terms of a settlement.

6.4 The era of enforcement

Far from failing to have an impact, even up to the present the ICC is having a profound impact on this conflict. Its warrants have ensured that two peace processes that were delicate and uncertain at best could not succeed, and a decade later the Court continues to ensure that no peace deal can be achieved while the LRA remain undefeated and their leadership remain averse to trial. It has ensured that an 'era of enforcement' is imposed on LRA-affected communities. This is characterised by an internationally-supported war for legal enforcement, in which innocent civilians have continued to suffer, and negotiated routes to end the violence are precluded. The human rights of communities affected by atrocities have been subordinated to the requirements of legal principle. The region is undergoing a continuing period of influence by the ICC, locked into a war that is legitimised by the Court.

6.4.1 Justice delayed

In this context it is clear to see that the claim that 'justice delayed is justice denied', proposed by some at the Review Conference, is simplistic (AI 2008; Akhavan 2009: 631; ICC 2010a: 6-7; Vinjamuri 2010). The application of international criminal justice in the LRA-affected region is ongoing, and to the extent that justice is perceived as pertaining only to the narrow remit of effecting ICC warrants, it is partially successful. Through the Court's insistence that the warrants not be withdrawn and that the negotiations lead to retributive punishment, all talks have collapsed indefinitely and the suspects are thus barred from securing impunity for themselves. Some aspects of justice, that might be achieved through an end to the violence, are thus delayed by the military pursuit of others—in this case now the arrest of one man alone, the LRA's leader Joseph Kony.

The cost of this projection of the standards of international criminal justice for the LRA high command has been borne principally by the communities who continue to be caught up in the violence. Justice for them is a broader issue, encompassing their own security and access to the most fundamental human rights (Armstrong 2010: 191-213). Analysts from outside the region will differ about the merits of the sacrifice those communities are obliged to bear, and whether international criminal justice itself is well served by this principled but impractical and morally contentious approach.

6.4.2 Rediscovering consequences—claiming success

The ICC review conference in 2010 presented a chance for critical evaluation of the LRA warrants. The Prosecutor and supporters of the Court continued to claim positive consequentialist successes on the basis of the Court's principled approach (HRW 2010a; ICC 2010a; Tolbert and Wierda 2010). The ICC itself highlighted the dramatic reduction in killings in Uganda (and elsewhere) that took place in the years after its intervention, as support for its cause. In its material it appears not to show all LRA-related killings in DRC at the end of 2008, (nor indeed many other killings that took place in that country at the time, concurrent with its DRC interventions). In relation to the Uganda figures, it presented them without any contextual analysis or discussion of the possible causes of violence reduction—such as the Sudanese CPA, the return process, and developments in the UPDF's war, and the LRA's departure from Uganda. Graphs of killings in Uganda were included as if they represented evidence for ICC efficacy. As we have seen, in Uganda the proportion of conflict-related deaths that were killings by armed groups was less than 10% of the total, and thus a focus on killings is misleading (ICC 2010a). Some will question whether such material is intended to inform.

Other misrepresentations have included the presentation of the geographical shifting of the war due to the movement of the LRA as the achievement of 'relative peace' in northern Uganda (without mentioning the displacement of the

war to the DRC and CAR), characterising the LRA as defeated, and asserting that the ICC has contributed to a 'peaceful settlement' of the conflict (Akhavan 2009: 641; Otim and Wierda 2010: 5,6).

As these unsubstantiated assertions and misrepresentations were being made at the highest international levels, including at the conference itself and in authoritative academic journals, they have continued to influence or frame the debate about the ICC's impacts and future development (HRW 2010a; ICC 2010a; ICC 2010b; ICTJ 2010; Tolbert and Wierda 2010; Schabas 2011).

However, in relation to application of the warrants some success has been achieved since (5.3.2). Dominic Ongwen, the LRA's second in command at the time, has been captured and is now facing trial in The Hague (BBC 2015c; BBC 2015b). Even this measure of success presents complicating factors. Ongwen was abducted aged between 9 and 14, and has been held by the LRA ever since (JRP 2008; Ross 2016). Even if convicted of unspeakable crimes, as seems likely, there is the issue of the profound trauma he has suffered as an LRA captive, having been tortured and forced to watch violent killings as a child, and having remained within the LRA ever since. The Acholi community is not united in celebrating his trial by the ICC (ibid).

It may not be the Court's responsibility to assess the effectiveness of its intervention at this point, but the war of enforcement has been a bloody one, and estimates suggest the LRA alone have been responsible for over 2,300 deaths since the start of 2009, and over 5,300 abductions, 3,000 of them unresolved (Invisible Children 2014).

6.4.3 Shifting the blame

If the Court has succeeded in strengthening the principle that international war criminals may no longer expect to escape justice through negotiations, it has done so at the expense of considerations outside its remit—those of a moral

and practical nature. And those issues, while immaterial in legal terms, include the continuation of the war and its consequences for communities.

The Prosecutorial position is contradictory with respect to this suffering. This thesis has shown how the Court's interests clearly diverge from those of the affected population, when neither threats of violence nor the collapse of peace talks would cause its Prosecutor to waver in his resolve to set the imperatives of legal principle above community concerns. When in 2007 he placed practical and moral considerations outside his remit, and determined to interpret justice narrowly within the Court's interests and purposes, he was choosing not to consider the consequences of his actions, but instead to apply legal principle. Actions taken regardless of likely consequences will nevertheless have consequences, though these may be deemed immaterial to the application of the law.

In the years subsequent to the collapse of the Juba process the war has dragged on, at a lower level but with thousands of casualties (Invisible Children 2014). The Prosecutor has sought to dissociate the Court from the war that it has helped to legitimise, identifying its ongoing tragic consequences as a failure of international commitment to apprehend the suspects, which in reality is a failure of commitment to military enforcement. Military efforts were failing prior to the Court's involvement, and so the principal impact has been the indefinite closure of negotiations as a possible route through which to end the violence. The consequences of ICC engagement for the communities affected are beyond the remit of the Prosecutor. However predictable the negative consequences of intervention, the task of spanning the divide between high-minded legal principle and preventing violence on the ground is apparently for militaries, states and the international community to resolve (Ocampo 2007a: 9; Ocampo 2007b; Ocampo 2009: 4).

In short, the Court is mandated to intervene without regard to the broader consequences, and will identify others as responsible if there are negative outcomes. As already noted, the period of enforcement was in any case

expected to be bloody. Militaries from around the world were anticipated to participate, and it was thought that a price would have to be paid to establish the rule of ICL (6.1.1, 6.2.4). The broader ramifications of the application of legal principle to violent contexts will be discussed in the next chapter.

6.5. Review

6.5.1 Summary in relation to the key points of the dominant narrative

At the conclusion of this presentation of the evidence relating to the case study it is pertinent to briefly revisit the key claims made by advocates for the Court listed in 5.4, and assess which have withstood the analysis.

1. The notion that ICC intervened on behalf of the abducted children and their communities (5.1.2) is contradicted by the evidence (6.2). The Court, in accordance with its Statute, intervened to apply international criminal justice and bring an end to impunity. The enforcement path that this entailed set aside community interests as they themselves perceived them, in favour of the priorities of international criminal justice (6.4).
2. The perception that the ICC was intervening in a conflict that was going nowhere, in the absence of effective alternative strategies likely to bring it to an end (5.1.4), was entirely incorrect (4.4, 6.2.3). There was an effective local community-based strategy for ending the conflict, well placed at the advent of peace in southern Sudan.
3. The claim that ICC might withdraw in the interests of justice, should it be necessary (5.1.5), referred only to 'justice' as defined by the narrow interests of international criminal justice and the Court, and thus not to justice or security issues pertaining to the civil society which fall outside the Prosecutor's remit to consider(4.2, 4.3, 6.2.2, 6.2.4, 6.3.4).
4. The belief that UPDF was an appropriate means for enforcement of the warrants (5.1.3) ignored the fact that the UPDF was itself a mass

perpetrator of violence against the population in its own right (4.2, 4.3.4, 6.1.1). It was appropriate only in the sense that, if the legal requirement for enforcement of the warrants were to be prioritised over all other considerations including community safety, it posed the most credible military threat to the LRA.

5. The claim that the ICC, with others, brought Kony to the negotiating table (5.2.2), is not supported by any evidence and remains pure conjecture, though it is widely disseminated (6.3.2).
6. The assertion that the ICC was not responsible for the collapse of the talks is misleading (5.2.3, 6.3.1). Analysis clearly indicates that while it may not have caused the failure of these processes, it did ensure that they could not succeed (6.3.4).
7. The notion that the LRA were not negotiating in good faith, based on observations that they were also preparing to resume hostilities, is not logical(5.2.3). In reality both parties were engaged in this pragmatic activity while negotiating (6.3.4).
8. The hope that the ICC's impact would reduce the intensity of the conflict, and the associated suffering, whether through the deterrence its warrants confer or other means (5.1.1, 5.1.2) is not supported (6.2.1). LRA violence reached its highest peak after the warrants were issued, during the Christmas Massacres, so deterrence seems to have failed (6.2.1). There is no evidence that the subsequent reduction in LRA violence is ICC-related, and violence continues in DRC and CAR.
9. The notion that local communities deserve international standards of justice, and that other approaches are selling justice short (5.3.1) ignores the fact that the ICC has not delivered justice, even on its own limited and technical terms (6.4). As a minimum, it has also denied local people a voice in determining what justice is, and in how it might be achieved (6.2.4, 6.3.5).
10. The notion that enforcement efforts will have been worthwhile, whatever the cost in civilian lives, is central to the Court's overarching mission, but highly controversial in this first context (5.1, 5.3.2, 6.3.5, 6.4).

11. The hope that the interests and actions of the ICC would be aligned with upholding the human rights of communities affected by conflict is clearly false (5.1). In reality it subordinated community wishes for an end to the violence, and damaged their strategies for peace, justice and human rights (4.4, 6.2).

We can now see that, of all these claims—asserted in the literature by the most prominent advocates for the Court's Uganda intervention, and which underpin the ICC's own understanding of its work—none are supported with evidence. Most are contradicted. The Court's narrative is not an evidence-based interpretation of events, but a collection of initially un-evidenced statements and conjecture that are then referenced and re-referenced in the literature to establish a community of belief. The cornerstones of that narrative do not rest upon research, and pending any evidence-based defence of its interpretations, it should be set aside. It is contradicted by a substantial body of work by local Ugandan human rights organisations, peace workers, researchers and international academics who were present on the ground during the conflict and ICC intervention. The question of why such a baseless account should have been so promptly assembled and enthusiastically disseminated will be addressed in Chapter 8.

The ongoing effect of the Court is significant. The opportunity for successful peace talks was twice precluded by the ICC's warrants, but the most decisive impact of the warrants in this case may have been neither ensuring the collapse of the Bigombe process, nor even the Juba talks. The overarching effect of the warrants is that they prevent peace talks permanently. While ICC suspects within the LRA leadership evade capture and sustains their aversion to trial, the region is committed to war. Far from being ineffective, the ICC's warrants may be have been decisive in delivering an ongoing impact on the conflict and the region. They are upholding the international community's principled prioritisation of the ending of impunity by sustaining the war. Consequentialist humanitarian considerations aligned with the community desire for peace are indefinitely postponed.

6.5.2 Conclusion

Founded upon an understanding of the situation that was less than fully informed, the Court intervened on the side of the Ugandan Government, anticipating that this route presented an opportunity for military enforcement. The Court's analysis of the conflict dynamics did not extend to the material provided in Chapter 4. It failed to appreciate that it was a three-sided war, in which the goals and interests of the community were not represented by the Government. It also failed to adequately consider the alternative strategy to end the violence put forward by leaders of the affected community, which was at odds with the Court's requirement for military enforcement. Subsequently, as described in Chapter 5, an already discredited narrative of the conflict was further developed and disseminated in support of the Court's intervention.

Chapter 6 presented an evidence-based account that demonstrated this narrative to be flawed in multiple respects, and proposed an alternative understanding of events rooted in community accounts of the conflict. The ramifications of the warrants within the region may continue, depending on the trajectory of the conflict; however, the lessons to be drawn extend far beyond the Ugandan situation. Findings will now be drawn beyond the immediate case study context.

Section 3 Impacts and implications

Chapter 7—The implications for international criminal justice

Section 1 of this thesis culminated in the identification of assumptions, fundamental to the Court's Statute and function, that would be tested in volatile contexts (3.3.1). Section 2, has revealed the outcome of the Court's engagement in the LRA case. It concluded that the impact of the Court was severe in terms of its effect on human rights, peace, and self-determination of war-affected communities—outcomes on the ground predicted at the time.

In this Section it is now possible to identify whether the case study results indicate case-related concerns alone, or whether the negative impact of the Court in the LRA war was due to false assumptions of its Statute and implied mode of operation. If the issues revealed are rooted in the Court's Statute and purpose, then the one case could indicate fundamental flaws. If those flaws are emerging in other cases and situations, then the flaws in the ICC's structure and function will be more strongly demonstrated.

As previously outlined, the assumptions fall under four headings and concern the primacy of the Court, its specific interpretation of justice, enforcement issues, and its theory of change. Considering matters ranging from practical and operational constraints to structural and conceptual underpinnings, using these themes this Chapter will move from case-specific and particular findings to determine their wider validity and institutional ramifications.

7.1 Primacy

7.1.1 The Court's primacy

Implicit in the vision that underpins the Statute is the notion that the particular approach promoted by the Court will be appropriate in all contexts where the Statute applies. The specificity of the ICC's approach and mechanism belies the universal applicability of the solution that it proposes. While the task of extending the ICC's reach is ongoing, it is intended to set the standards for a global norm of international criminal justice; a one-size-fits-all response to international crimes. This universality is central to its vision (3.1.2, 3.3.1a).

With its first case, a precedent has been established—that pursuit of this task be independent of 'moral and practical considerations'. To do otherwise would threaten the standing of the Court itself (6.2.4). The case study has clearly demonstrated that, even under extremely testing circumstances, issues concerning the 'interests of justice' enshrined in the Statute are narrowly defined to relate to the advancement of ICL. The limits of prosecutorial consideration exclude most aspects of 'justice' as it is commonly understood.

Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute (3.1.2). This is in line with its Preamble and Articles 86-87 of the Statute, which indicate significant powers of the Court to request assistance from a state, and the obligation of States Parties to co-operate. States are not empowered to refuse to co-operate, nor to negotiate with the Court in relation to its requests. The United Nations too is legally required to co-operate with the Court (ICC and United Nations 2004).

7.1.2 Evidence from the case study

The notion that the interests of affected communities, international criminal justice, and the Prosecutor are aligned, as anticipated in the Statute, has been previously discussed (3.3.1). In relation to 'the interests of justice', various Articles of the Rome Statute indicate that the Prosecutor is charged with the responsibility to decide how this is interpreted (2.3.2, 3.1.2-3, 5.1.5). It was perhaps initially unclear whether this term included the interests of the communities affected by the crimes concerned. There appears to have been an assumption by the drafters of the Statute, and initially by the Prosecutor, that there was an association between the interests of justice for the Court and for the affected communities. Apparently the Prosecutor initially understood himself to be intervening in their interests; however, this misperception was short-lived. The issue was unequivocally addressed when he clarified that in the Statute the 'interests of justice' referred not to the interests or human rights of the communities concerned, but to the process of the extension of international criminal justice in its legal sense. His later statements underscored this interpretation, and specifically excluded concerns about security and peace as beyond his remit. As these were explicitly central to the community's interests as they perceived them, this was decisive. While sometimes they might coincidentally be similar, as interpreted the interests of 'justice' are not necessarily the interests of the community, and at times they may be opposed (6.2). This is significant when concerns of the civil society relate to reasonable risk of mass killings or death from other causes, abduction of potentially hundreds of children, and population displacement from homes and livelihoods.

This first ICC case then has raised a crucial issue. With the interests of international criminal justice, Court and Prosecutor so very different to those of communities affected by violence, what mechanisms are there to uphold community interests? The answer, as the case study has determined, is that there are no formal mechanisms as such. Having no means to influence the

Security Council, communities may petition the Prosecutor, as they did, but no more. The Court's process has primacy.

Other stakeholders were equally estranged from local interests. The Ugandan Government was focused on its military process; the UN, and other international agencies associated with it, are obliged to uphold the purpose of the Court and are thus either actively or passively aligned with it; international human rights organisations who might normally seek to uphold human rights of war-affected communities, and are expected to do so by their public constituencies, were instead also institutionally committed to the Court. There were in this instance no formal mechanisms or mainstream independent channels through which to promote local interests. Astonishingly, while the Court, the Government, the UN, the international human rights community, and even the LRA all claimed the legitimacy of representing the interests of the community, it was the community and their representatives (and local human rights advocates) alone who expressed and continue to express their desire for the resolution of the war through talks without preconditions. Such an approach remains unacceptable to all other parties (except possibly, and ironically, the Ugandan Government).

The ramifications of this divergence of the interests of the Court and international institutions from those of the affected population, are profound. Far from lending protection, the Court leaves populations unusually vulnerable to the military violence that has become associated with international intervention. Evidence from the case study indicates that the primacy of the Court's process, bringing with it the overarching prioritisation of ICL grounded in the Statute, is associated with a requirement upon the international community to depart from the prioritisation of the interests of war-affected communities. The case also suggests that the Court's primacy may serve to prolong conflict for significant periods, in anticipation that this will further ICL.

7.1.3 Observations from other situations

Similar issues have been encountered in other diverse contexts. Syria has signed but not yet ratified the Statute (ICC 2016). Assad is likely to be responsible for international crimes, and were he to fall within the Court's jurisdiction it is far from clear that the issuance of warrants would help to further ICL (see 2.2.2). In the context of Russian military engagement in support of the Assad regime, legitimisation of efforts for his arrest could have highly unpredictable consequences (Buckley 2012; Al-Saleh 2013; Buchanan 2015). It is perhaps fortuitous that through the delay in ratification, the Court, with its deontological mandate, relatively weak capacity for conflict analysis, and potential to legitimise violent enforcement for retributive goals, cannot intervene.

Two further examples that call into question the universal effectiveness of the principled application of ICL may reinforce this point (3.1.2). In South Africa, the Truth and Reconciliation Commission (TRC) contributed to the successful navigation of a dangerous phase in that country's history. The white community perceived itself as under great threat, and amongst them were groups seeking to defend their interests with violence (Clark and Worger 2013). The black majority on the other hand had suffered enormously from the crimes of apartheid, and many harboured a desire for retribution. Tensions within these communities were also severe, and the end of the apartheid era held the potential for violence. Few now would dispute that the apartheid regime committed international crimes, yet it is far from clear that in 1994 a binding retributive justice frame imposed from outside would have been aligned with the broader interests of the affected population who had already suffered so much (Berat and Shain 1995; Wilson 2000). Amnesties then granted through the TRC process would no longer be permitted. Had the ICC been created a decade earlier, South Africa's recent history might have instead reflected the requirement for a militarised and retributive application of justice, in place of its peaceful restorative justice approach.

In 1998, only two years before the ICC came into being, the Northern Ireland Good Friday Agreement permitted the release from prison of convicted paramilitary prisoners who had been tried and found guilty of violent crimes. Peace was achieved, and the interests of the population furthered, through negotiations that delivered a measure of impunity (*Good Friday Agreement* 1998). While the crimes they were convicted for fell below the ICC's threshold for international crimes, the principle of primacy of ICL being aligned with the interests of communities affected by atrocities again did not hold. Through setting aside criminal law in this instance, violent crimes have been greatly reduced and the rule of law advanced.

The conclusion cannot be avoided, that the assumption embedded in the Statute, in favour of the primacy of the application of ICL by the Court, may prevent other approaches to justice by international or local actors. The ill-considered or premature application of retributive justice does not necessarily further the Court's own purpose and the rule of law.

7.2 Justice

7.2.1 The Court's conception of justice

Based upon its Statute, issues concerning the Court's less consequentialist, more deontological frame of justice, have been noted (3.1.3,3.3.1). Previously, in assessing possible interventions, prior consideration of the consequences on the ground was often highly significant—even when associated with other less transparent agendas (Roberts 1993; Anderson 1999; Evans and Sahnoun 2001; Seybolt 2007; Evans 2009). The role of prior consequential assessment has now been significantly reduced. In its place, the Prosecutor is mandated to apply a deontological frame. In legally mandating this shift away from consequential assessment of humanitarian impact, the international community

has made a bold—some might say an astonishingly bold—move (3.3.1) (Schiff 2012).

This contrasts with developments in other fields of intervention. The discourse concerning international development interventions has for at least three decades emphasised the importance of understanding the context in which an intervention is to take place. The importance of accountability to the communities intended to benefit from interventions has been emphasised by many, and the evolution of the international development discourse has been influenced by such issues. Externally contrived models unwaveringly applied have been criticised as inappropriate and ineffectual; in many instances a strong understanding of and engagement with the relevant communities, likely to include shared analysis informed by them, may be a prerequisite for success (Chambers 1983; Chambers 1997; Easterly 2007).

The ICC is obliged instead to employ an approach which is both deontological and normative (3.1.3, 3.3.1). The application of legal principle is explicitly not for adaptation to suit local circumstance. The justice remedy brought by the Court is to a significant degree one developed elsewhere in generally stable situations, now to be applied in volatile contexts globally without context-specific adaptation. The principles enshrined in the Statute, and the processes associated with it, are anticipated to be clear and unwavering; this uniformity of approach is perceived not as a shortcoming, but as a strength.

If the solution to be applied by the ICC—issue of warrants, arrest, trial and punishment—is already determined, the need for understanding of the context to which it is to be brought is operational only. The intervention itself is known from the start and rooted within the ICC's purpose; it should not, indeed cannot, be redesigned. The application of legal principle does not require a detailed prior understanding of context, and indeed the legitimacy of the Court may depend to some extent upon it not being (overtly at least) influenced by such matters (Vinjamuri 2010).

Perhaps because the requirement for contextual understanding was perceived to be limited to operational issues, the Prosecutor is empowered by the Statute to take the relevant decisions him or herself. He or she is not expected, in addition to being a Prosecutor, to be highly informed in conflict dynamics, military strategy, international diplomacy, and also an expert in each volatile context into which the Court seeks to project its authority. The relevance of contextual factors is anticipated to be limited to issues appropriate to the application of prosecutorial discretion relating to the Court's process, and no more (*Rome Statute of the International Criminal Court* 1998: Articles 53-54). Additionally, the frame brought by the Prosecutor to volatile environments is retributive and, common to all other retributive mechanisms, it requires enforcement, often against the will of the transgressor.

In summary, the Court brings a new understanding of justice and the means of its furtherance, rooted in its Statute and rules. Because the form of engagement is known from the start and does not depend on context, and the judgement about the success of the intervention is not based on its consequences (except in a very narrow legal sense) but on the application of legal principle and retributive enforcement, there is relatively little need for the Court to engage thoroughly with the complexity of situations. These are in any event areas beyond its expertise.

7.2.2 Evidence from the case study

Support for the Court from the international human rights community, including Amnesty International and Human Rights Watch reflect a hope that application of ICL through the ICC will help to deliver positive human rights outcomes, even though the understanding of justice that it brings is different. Based upon the evidence of the case study, it is also quite clear that those with an interest in human rights from the affected population itself, such as HURIFO, ARLPI, JPC, the religious and traditional leaders, held and continue to hold the opposite view (HURIFO 2002; ARLPI et al. 2003; ARLPI 2013). The local

human rights community demanded that people on the ground to be allowed to seek an end to the violence, while the international human rights community held out instead for its continuation in furtherance of international criminal justice enforcement. This international position was widely re-asserted at the ICC Review Conference in 2010, where human rights campaigners were prominent in advocating 'no peace without justice' (6.3.6) (HRW 2005; AI 2008; HRW 2009b; HRW 2010a; ICTJ 2010; Roth 2010; HRW 2015). In this they have been successful, as negotiations to end the LRA's violence have been precluded.

Communities situated in violent contexts are of course likely to be highly consequentialist in their considerations. Few will feel that they should be sacrificed for the greater good or the furtherance of a principle imposed upon them. They are very unlikely to consider their interests represented by an institution that is coldly principled and unwavering in its search for retributive justice for a handful of individuals without regard to the costs.

There is then a conceptual flaw running through the Statute, in which the interests of communities and the Prosecutor are not identified as distinct and likely to be opposed to one another. Communities will be consequentialist; the Prosecutor will be deontological. One result of this error is that there is no mechanism through which communities can protect themselves from prosecutorial decisions that are clearly against their interests.

Recent events in relation to the LRA case further illustrate this point. The arrest of Dominic Ongwen after ten further years of war against the LRA was hailed as a success by supporters of the Court (6.4.2). The consequences of the violence that took place prior to his arrival in custody, and his likely replacement in the LRA's hierarchy in any case, are beyond its remit. With thousands dead and thousands more abducted since the resumption of the war after the Juba talks, there is no mention (for example by international human rights defenders) of balancing considerations in declaring 'a major step for those affected by the LRA's long history of crimes'(HRW 2015). The announcement continues to

wrongly conflate the legal justice of the Court with justice as perceived by local communities.

In the Uganda case then, international criminal justice was advanced, framed as the delivery of 'justice' for the affected communities, though their representatives requested and consistently petitioned for alternative justice approaches, and surveys indicated that international criminal justice was relatively unimportant to people on the ground compared to other issues (4.4, 6.2.2, 6.2.4).

Finally, in contrast to its relationship to consequences for the communities affected by its warrants, the Court, like all institutions, is mindful of the consequences for itself and furtherance of its cause, and this has already been witnessed (6.2.4). It can be expected that the ICC will continue to pursue its own interests in a flexible, consequentialist manner, while having licence (or even the responsibility) to set aside consequential considerations in relation to communities it mistakenly claims to serve (Clark 2008c: 44).

In conclusion, we can expect the Court and affected communities to have opposing interests, and opposing notions of justice, in other situations of the Court's intervention. Based upon assumptions that stem from the Statute, about the nature and universality of justice, the ICC's capacity for situational analysis is too weak and its institutional antipathy towards adaptation for local contextual factors too strong. Its normative and deontological assumptions about justice and how they can most effectively be furthered are not borne out. For those who prioritise human rights for war affected populations, Uganda case study has left no room for equivocation on this point.

7.2.3 Observations from other situations

Observations from other contexts support these conclusions. In Kenya ICC warrants were issued into a much less volatile context than northern Uganda; however, the possibility of violence against witnesses and their families was foreseeable in advance. However, the Court's deontological purpose triumphed over more cautious consequential considerations when it issued warrants into a situation where witnesses were vulnerable. As it transpired, the violence that ensued caused the cases to collapse through lack of evidence. The overall impact of the Court is debatable, but the notion that justice, or even the Court's own narrow purposes, will be served simply by issuing warrants can not be easily assumed (Allen 2013; Bowcott 2014; Mueller 2014; Paisner 2014; Mathenge et al. 2015; Rosen 2015).

The case of Syria is also illustrative. Initially in response to Assad's brutal crushing of popular protest, the West's approach indicated a deontological emphasis on prompt trials. This shifted to a tolerance of Assad's role in the fight against Islamic State of Iraq and Syria (ISIS), when the West's own consequentialist interests seemed threatened (just as communities threatened by violence prioritise consequentialism). The West's position now suggests a desire to strengthening of its deontological commitments, but only once sufficient stability returns and its own interests are secured (Traynor and Beaumont 2012; Black 2014; Hughes 2014; Riley-Smith 2015). This is an implicit recognition of one of the research findings—that the Court's emphasis on legal process is best applied when the consequences of doing so are brought under control. Deontology does not guide engagements effectively in extreme environments—even in relation to the narrow task of advancing its own principles.

In Rwanda too the limited nature of judicial approaches to diverse justice issues has also been recognised. The ICTR brought a strongly deontological and retributive frame to the post-conflict situation. Justice, interpreted narrowly and applied by that institution, was necessarily not an attempt to address the

profound societal needs of Rwandan communities. Many aspects of justice fell beyond its remit, and in the event it proved to be a relatively ineffective means of furthering reconciliation (Clark 2007; Clark 2008a). By contrast, and as in the case of Ugandan justice approaches, the locally influenced process—in this case *gacaca*—was far more nuanced. This hybrid procedure encompassing legal and other responses to injustice, was a pragmatic response to diverse social needs. With holistic goals that were physical, psychological and psychosocial, critiques of that system have failed to recognise its multifaceted and deeply personal nature (Clark 2010b). The challenges of linking the narrow criminal justice process with broader post-conflict agendas has been recognised (Kamatali 2003).

The situation in Darfur was referred to the Court by the UNSC in March 2005, and in March 2009 Sudanese President Omar Al Bashir became the first sitting president to be issued with an ICC arrest warrant, and the first person to be charged by the Court with genocide. The impact of that warrant has been criticised by scholars, who believe that this has complicated efforts to promote human rights, some being concerned that far more extreme forces might come to the fore should he be arrested. Once again the emphasis on narrow legal justice concerns central to the Court's mission is perceived to threaten grave human rights consequences in a situation of great violence and instability (de Waal 2009; de Waal and Stanton 2009; Flint and de Waal 2009; ICC 2016).

The Court's intervention in volatile contexts has in the past been construed as a gift to communities affected by violence, even when they entreat the Prosecutor not to intervene (6.2.4). If the Court continues to prioritise deontological justice in dangerous situations, its interventions will continue to be associated with negative humanitarian consequences, precisely because it is mandated not to consider them.

7.3 Enforcement

7.3.1 The Court's enforcement process

The assumptions relating to the Court concerning enforcement are summarised in 3.3.1. Enforcement of international criminal justice is integral to the vision for the ICC, and required in order that retribution can take place and impunity be addressed (Ocampo 2005b; Robertson 2006; Ocampo 2009). It has been noted that in volatile contexts enforcement may be violent. Administered by forces outside the Court's control (but legitimised by it), there is an unstated assumption that the violence that ensues will not be disproportionate. At the point when considerations of consequences are deprioritised, violent interventions are legitimised. The means for civilian protection from any impact of the warrants are unclear or absent. Issues of peace and security, as well as broader notions of justice, remain beyond the Court's remit.

7.3.2 Evidence from the case study

7.3.2a The military 'era of enforcement'

The case study has presented multiple issues of concern relating to enforcement. The issuance of the warrants was necessarily rooted in considerations of the crimes, the likely culpability of the prospective ICC targets, and the possibility of effecting arrest. The warrants required military enforcement (3.3.1). Realistically, the Ugandan military was the only credible means by which to seek arrest, and it is clear that from the outset the Prosecutor envisaged them as the principal enforcers for the Court. With no apparent shift in military strategy, the central dynamic of the war, in which the UPDF sought to kill the abductees at a sufficient rate that the LRA be incapacitated (4.3), was harnessed in the cause of international criminal justice enforcement.

Military enforcement in volatile contexts was always going to have costs. Warlords accused of monstrous atrocities are unlikely to acquiesce to arrest;

bringing them to book will require militarily engagement. At times, the extension of international criminal justice into these contexts will be a violent process. These points are all clearly acknowledged by advocates for the Court, and Robertson's vision of enforcement resonates with Goldstone's anticipation of a cost associated with achievement of the new era (3.1.5); Ocampo's call for the mobilisation of militaries around the world to arrest warlords attests to their shared understanding (6.1.1, 6.2.4). International criminal justice enforcement in violent contexts is envisioned as military.

7.3.2b The risk of disproportionate violence

In the Uganda case, where the UPDF was clearly envisaged as the principal enforcer, the process for evaluating its suitability for the purpose was not transparent, and it is not clear whether the Court even had the analytical capacity to understand what its selection of the UPDF implied. The Court may not even have understood the dynamics of the war itself. Certainly what analysis the Court did publish relating to the Uganda cases has since been withdrawn and withheld (4.3.3).[52] Others acknowledge the UPDF's well-documented role in displacement of the Ugandan population in the early part of the enforcement period (4.2 and for example HRW 2009b: 28-30). However, the centrality of UPDF violence to ICC enforcement efforts, which includes the deaths resulting from displacement and the killing of abductees as part of the UPDF's war fighting strategy (4.2, 4.3, 6.2), is barely discussed by the international human rights community. With hindsight it is hard to conceive how the violent consequences of enforcement can be seen as proportionate or acceptable.

Even setting these matters aside, any enforcement process may go awry. Had the UPDF's strategy not involved killing the abductees, and instead been targeting military personnel, there is still no formal or comprehensive mechanism by which the Court can assess the likely impact of its warrants to ensure that the human rights consequences are proportionate and acceptable.

[52] It is not clear how the Court justifies its withholding of such information. If it does not wish to investigate the impact of its interventions, it is important that it should not obstruct others from doing so. This issue is discussed in 7.5.2.

Many will disagree with the fundamental assumption embedded in the Court's process—that military enforcement in all instances and situations will necessarily be appropriate. Certainly in this first case, with the detaining of only one suspect following a decade of war, the Court's operational assumptions concerning proportional use of force are contradicted.

7.3.2c Unprotected witness communities

The selection of the LRA commanders for warrants demanded the use of the UPDF, which in turn precipitated the Court's entanglement in its violent strategy; but there were other assumptions revealed by these developments. In complex and volatile contexts it may not be reasonable to assume that responsibility for security will be met by the State or other international actors. This includes in circumstances of increased danger to civilians or witnesses resulting from the Court's activities (3.3.1).

The notion that the Court might endanger witnesses through its investigations is justified, as defendants or others (including governments) may wish to prevent their testimony being heard. The Court's intervention raises the stakes for wanted ICC suspects, and promotes the possibility of violence against those who pose a threat through the legal process.

The Statute's provision for the protection of witnesses does acknowledge the possible risk to them and at times their families (for example Articles 43(6), 57(3c), 64(6e), 68, 70(1c), 87(4) and 93(1j). It includes provision for various measures to protect them, their identities and their evidence through the trial process, and some mention of their protection more widely. However, it does not indicate the possibility of whole communities, from which witnesses come, requiring protection, and as we have seen, such targeting strategies have been used by the LRA (6.2.4). Indeed, collective punishment is not uncommon in war, and is named in the Geneva Conventions (ICRC 1949). Nor does it go into detail on the provision of security where a state is unwilling or unable to provide it, or indeed where a state (or prominent figures within it), may

be a perpetrator, as in the Ugandan, Kenyan and Sudanese cases (4.2, 4.3, 4.4, 6.1).

If the Court is intended to intervene in these contexts, its systems must offer credible means of protection to those put at risk by its process. Clearly these issues might be considerable, relating to military deployment. Yet without an army the Court can do little, and in the LRA case statements by the former Prosecutor, indicating that he had passed responsibility for security to the UPDF and Government, effectively washing his hands of the issue while failing to provide protection, did not constitute adequate protection (5.1.3). Additionally, some will consider that assuring those at risk that they will be protected, while acknowledging to other audiences that community interests would if necessary be set aside by a Court unwilling to submit to blackmail, is disingenuous (6.3.5).

7.3.2d International criminal law and the alignment with superior force

One of the most surprising assumptions embedded in the Statute is that superior military force will be aligned with the ICC's criminal justice interventions, and/or that the violence or ongoing conflict associated with its enforcement is in some other way worth the associated suffering (3.3.1). The notion of an 'era of enforcement' clearly anticipates coercion or violence, heralding arrest and trial; not defeat. Enforcement actions, even if they involve military engagements or wars, are anticipated to be successful, and never to incur disproportionate suffering.

This case study points to an accommodation with power that may be required to harness the necessary military enforcement capacity. Having associated his intervention with the Ugandan Government at the point of referral, the Prosecutor was in a weak position to question the displacement of the population to the IDP camps which was soon to escalate catastrophically. Nor could he easily question the UPDF's longstanding military strategy of killing the abductees, with which he had chosen to associate the Court (4.2). From the outset, the application of international criminal justice in the Ugandan context

was compromised: military force was not aligned to the implementation of international criminal justice, but the reverse.

However, in the extremely violent situations in which the Court has chosen to engage, enforcement is likely to be violent. The belief that justice will prevail through military enforcement wherever it is deployed is astonishingly naive. Yet that seems to be the implicit assumption: the Court will intervene in volatile contexts primarily on the basis of the application of criminal justice principles; it is equipped to do so without a particularly strong capacity in context or conflict analysis (as has been shown); and through enforcement processes that are military and violent where necessary, it will extend international criminal justice and the rule of law.

In the LRA case, over the past decades the balance of military power has been insufficient to deliver a victory to any party, or to deliver wanted LRA suspects to custody (with the exception of Ongwen). Though displaced principally to the DRC and CAR, and dispersed over a large area, the LRA has continued its practice of abduction and killings.

The inescapable conclusion from this case study is that, a decade on, justice even as narrowly defined by the Court itself has not been decisively furthered. One former abductee, himself a victim of terrible LRA violence as a child, is now standing trial for horrific acts. In securing this achievement, the Court's engagement of the necessary military capacity has embroiled it in the continuation of a bloody war, its own enforcement being heavily implicated in the deaths of those it was seeking to assist, even at the hands of its own enforcers. The case study has revealed what should have been apparent at the outset, and was known to communities on the ground from the start: that simplistic notions about the association of superior military force with criminal justice ideals, and about the efficacy of military violence in delivering just outcomes, are not borne out. This assumption, embedded in the Court's mode of operations, and fundamental to its prospects for success, is incorrect.

7.3.3 Observations from other situations

The Uganda example is not an isolated case, and there are other examples illustrating the complications of enforcement associated with ICC warrants, and related violence experienced by civilians. The Court's military-backed process that subordinates considerations of consequence has been deployed elsewhere. However, wealthy and stable democratic states with a strong civil society, many of which are principled supporters of the ICC, would not tolerate violent military enforcement of the type seen in Uganda inflicted upon their own populations. National armies would not target abductees and displace large elements of the population, while enjoying international support and legitimacy conferred by the Court. On their own soil such nations are likely to accommodate a more nuanced approach to justice, including negotiated settlements that set retributive justice elements alongside other approaches, the better to establish broader justice goals encompassing peace, security and the opportunity to extend good governance and the rule of law through non-violent means. Yet these wealthy states support the application of the rigid strictures of violent military ICC enforcement in other states—principally poorer and weaker states in Africa. The notion that in doing so rich nations are applying a system to which they submit themselves, is another misperception.

The Libyan situation was referred to the ICC by the UNSC, and the investigation opened in March 2011. The warrant for Muammar Gaddafi followed and, aligned with UNSC resolution 1973, helped to legitimise NATO military engagement there until the end of October, following Gaddafi's death (ICC 2016). Although the first phase of the Libyan civil war then closed, its aftermath led directly to the ongoing conflict in that region, in which the state has collapsed and rival militia vie for control. Enforcement efforts for the advancement of ICL were not solely based upon the ICC's involvement by any means, but military efforts for the enforcement of its warrants were a contributory factor in precipitating the political disintegration of that country, and

the current level of violence. Enforcement efforts prioritising deontological justice norms have not advanced ICL. A number of analysts offer more nuanced restorative or political solutions (Harding et al. 2011; Kersten 2014; BBC 2016; Fraihat 2016; Reardon 2016).

Analysis of the situation in Liberia in the mid-2000s is also pertinent. The Accra Comprehensive Peace Agreement of 2003, which contributed to the conclusion of Liberia's second civil war, laid the foundations for an all-inclusive power-sharing interim government. With the Special Court for Sierra Leone (SCSL) established from 2002, Chief Prosecutor David Crane was amongst those calling for trials to be deployed in Liberia also (founded upon the claim to primacy). For reasons as much concerning the potential consequences of enforcement efforts, analysts have identified such a move as dangerous and destabilising, and there is no assurance that it would not have been so. In the event a court process was averted, and national elections were held in 2005 (Harris 2012: 192-200; Harris and Lappin 2015).

Even in cases where an international tribunal has apparently been most successful, such as the trail of Slobodan Milosevic, application of ICL was identified as a potential threat to political processes for peace and broader justice agendas. Subsequent analysis has called into question the implications of its limited justice frame (Hearst et al. 1999; Vulliamy and Wintour 1999; Clark 2008a; Clark 2009).

The Kenyan case is illustrative of another issue—the misalignment of superior force with ICL. The ICC issued warrants into a situation where power resides with the targeted suspects—a situation not specifically anticipated in the Statute. As discussed (2.2.3, 6.2.4), there is no robust statutory mechanism to stay the Prosecutor's hand in favour of consequentialist concerns in such situations. Members of the Kenyan Government, including Uhuru Kenyatta himself, have been able to evade trial through the silencing or withdrawal of witnesses prepared to testify against them. This has been brought about by a systematic campaign of killings and intimidation of witnesses triggered by the

warrants (Gekara 2014; Mathenge et al. 2015; Rosen 2015). Thus in a context apparently less violent than that of the LRA war, the Court's failure to ensure protection of witnesses has caused the case to be necessarily and inevitably abandoned, the ICC's consideration of consequences once again inadequate. Once warrants have been issued in these contexts, without a strategy to prevent them, killings—either in the course of international criminal justice enforcement or associated with suspects seeking to evade trial—may take place. The prospect of enforcement may precipitate rather than deter the violence of perpetrators.

In the Court's retributive mode, negotiations leading to peace with amnesty is a defeat; an ongoing war of enforcement is simply a delay—attributable to a lack of political will. Such delays may one day lead to successful arrest. The Court's relationship to the violence of its own enforcement process is not identified nor defined by its Statute. This conceptual lapse is understandable in the context of other courts. Generally these have been conceived to operate in stable contexts, where crime is generally addressed through a civil process. In the volatile contexts of ICC interventions the embedded assumption of stability and security is not safe. The suffering or death of civilians in large numbers during criminal law enforcement has not generally been necessary before. Now, as the case study indicates, and other observations confirm, it most certainly is. Operational implications of engagement have unveiled conceptual omissions of the Statute.

7.4 Theory of change

7.4.1 The Court's theory of change

The need for a theory of change has been discussed in section 3.1.7 and summarised in 3.3.1. Following the appointment of the new Prosecutor Fatou Bensouda in 2012, the attention to strategy was significantly enhanced. The focused approach to prosecutions was reformed; the possibility of a 'build

upwards strategy', deploying warrants moving up a chain of command, was indicated; open-ended in-depth investigations were announced. Greater field presence was indicated as desirable, as were improvements for security or witnesses. 'Critical success factors' were identified, though disappointingly they related primarily to Court process (Ocampo 2003; ASP 2006; Ocampo 2006b; Ocampo 2007a; Ocampo 2010b; ICC 2013b; ICC 2013e; ICC 2013c; ICC 2015d).

Despite these indications, strategic consideration of the link between the ICC's activities and its goal in the new and dangerous contexts of its operations remains weak. In these documents there is little mention of the likely obstacles to success, and how the desired impacts might be achieved while the dangers are avoided. How can populations be made safer rather than less safe by the Court's intervention? How can militaries be influenced towards activities less likely to harm civilians, and more likely to achieve arrest? How can the Court avoid legitimising or becoming embroiled in wars? And how can its warrants improve chances for peace and conflict reduction, rather than prevent peace deals and sustain violence? Clearly the Court's interventions have the potential for either outcome, and these questions were widely asked by communities on the ground in northern Uganda. Yet ICC documentation at the strategic level pays little attention to these questions, and fails to specify how the Court's activities would lead to the desired impacts (ibid).

Without the necessary underpinning, the link between the Court's process and the vision it hopes to bring about is uncertain. It is possible that ICC interventions are intended to cut through the complexities of context. From the perspective of states with functioning legal systems, themselves most prominent in the development of the Court, there was perhaps a sense that international criminal justice at least was something that could simply be exported. Given the terrible nature of the crimes involved and their near-universal condemnation, the uncertainties that bedevil other forms of engagement might not apply. And if the perceived imperative for criminal punishment is paramount, it should surely be implemented on the timetable and

terms of the Prosecutor, rather than negotiating its place amongst the many uncertainties of national and international efforts for security, stability, development and less clear-cut notions of justice. The former Prosecutor's strategy documents seem to suggest a linear approach of this type. Most of all, it was asserted that the process should not be subjected to the vagaries of diplomacy, 'the antithesis of justice' (Robertson 2006: xxxii). Within the legal context, the ICC's interventions are justified. The Prosecutor had a mandate to intervene.

7.4.2 Evidence from the case study

Retributive justice in an ongoing war will generally need to be applied by the victor, in order that it may be imposed upon the defeated party. But if victory or enforcement cannot be achieved, then the Court can at least prevent the sanctioning of impunity, by ensuring that negotiations do not deliver amnesties, and thus sustaining its position and credibility. The Court's warrants are still having an impact on the LRA conflict, preventing options for negotiations while legitimising ongoing enforcement actions (should there be any). The Court has successfully prevented talks that might deliver impunity and obstructed the end of perpetrator and enforcer violence. Meanwhile, other approaches to the establishment of justice, good governance and the rule of law that might follow successful negotiations, must wait.

Additionally, the Court's theory of change anticipates that by addressing the crimes of a few prominent perpetrators it will contribute to addressing the conflict situation in which they were committed. It is not envisaged that when those responsible for the most egregious crimes are removed, the violence will continue unaffected (Robertson 2006; HRW 2009b; Ocampo 2010a). The evidence from this case is equivocal. The LRA's campaign has always been one in which the role of LRA commanders seemed pivotal to the war. Yet the period of enforcement has been so protracted that it is quite possible to envisage a situation where the ICC's process might be accomplished while the

war continues. With Ongwen in custody by 2015, and Otti, Lukwiya and Odhiambo dead, only Kony remains (5.3.2). Some will argue that international criminal justice has at least been progressed, if only at a rate of one individual in custody per decade of war. Yet, with the LRA having abducted thousands in this period, it is not clear that replacement of a single commander—even one with experience—would present a particular challenge. Arrests at this incremental rate may be largely immaterial to the conflict dynamic. Crimes against civilians are continuing, but as a matter of security and peace this is beyond the remit of the Court and does not have a direct bearing upon assessment of its performance (6.2.4, 6.3.5). The initially plausible assumption so central to the Court's purpose, that by removing the most violent perpetrators the wider conflict would be addressed, remains questionable.

7.4.3 Observations from other situations

The Libyan case provides an instance where, although trials have not taken place, many of the priorities of the Court have been secured. An head of state likely to be found guilty by the ICC of international crimes was removed during the process of attempted military enforcement of its warrant. Yet with this partial success, as the Court might perceive it, ICL has not been advanced. To the extent that the removal of key perpetrators is intended to positively affect human rights and good governance, the intervention has failed (as some predicted it would). It has also failed to advance criminal justice. The theory of change of the Court is not demonstrated (Beresford 2014; Kersten 2014; Reardon 2016).

In Sudan it is not clear what the impact of the arrest of Bashir might be, should it be achieved, and the ICC has received significant criticism for its intervention from academics in the field. Such an event could open the door to substantial political changes; however, given the nature of Sudanese politics and the destabilising forces in the region their nature is not easy to determine, and their positive impact on human rights and good governance is not assured (Flint and

de Waal 2008; de Waal 2009; de Waal and Stanton 2009; Flint and de Waal 2009).

Additionally, it is unclear whether the application of the frame of ICL to the Israel-Palestine conflict, legitimising an emphasis on retributive processes backed if necessary by violent military enforcement, will help to resolve that conflict. The crimes committed are surely of sufficient magnitude, and legal action was prompted following the Israeli incursion into Gaza that began in December 2008. The drive for the recognition of Palestine by the Court is underway, and reflects a belief in remedies proposed by the application of ICL (Quigley 2011; Bob 2015). However, it is unclear whether the Court in this context can contribute to a resolution of that conflict. Any warrant issued for the current or former Israeli leadership could legitimise a further cycle of violence, by perpetrator or enforcer, while subordination of consequentialist human rights considerations of the affected populations may not be beneficial.

The apparent certainty that it would be better to see these perpetrators behind bars may have supplanted consideration of the complexities of how states change. Analysis of the complex role of international criminal justice within that broader process, and alongside other measures, has become marginalised. Relative to assertions concerning the imperative to end impunity, which even appear in the Statute itself (*Rome Statute of the International Criminal Court* 1998: preamble), there is less clarity concerning the precise circumstances in which the violent pursuit of international criminal justice will advance rather than hinder the achievement of good governance.

Being equipped with a mandate and a righteous conviction is not sufficient. Interventions must be founded upon evidence and reason. The evidence concerning interventions in volatile contexts does not support a belief in overarching frameworks— particularly not ones imposed externally from above that set the parameters for all other engagement and further a single aspect of governance alone. Nor are these debates settled in favour of standardised militarised interventions that set aside consideration of their consequences in

order to promote a clear principle. The theory of change that underpins the Statute and the Court's interventions in volatile contexts, and the framework it imposes on others, is not founded upon evidence (3.1.7). The reasoning required for sound action to be developed has not taken place. Multiple contexts including the case study indicate that in crucial respects the Court's theory of change is under-developed.

7.5 Remaining issues

7.5.1 Restraints upon the Court

The ICC may in future, on the basis of its mandate, intervene to bring a new retributive agenda to the Israel/Palestine conflict, or open cases following the ending of the war in Colombia (Brodzinsky and Watts 2016), but in these instances and many others the Court has so far not acted. All situations of its engagement outside Africa currently fall into this category, and they also include Iraq/UK, Ukraine and Georgia (ICC 2016). Some claim this reflects a bias of the Court to focus upon Africa with regard to its own interests (Dugard 2013). Others may assert that the Court has learned from its earlier mistakes, even though they have not been acknowledged—that the Court has in fact recognised that its theory of change does not necessarily apply. In that case, self-restraint of the Prosecutor might be sufficient. However, this argument is weak.

The Prosecutor is schooled in a particular, narrow, justice frame. The role is intimately tied up with promoting the interests of the Court and ending impunity—a role that prosecutors may find it difficult to set down when faced with competing claims to justice from local communities or for the advancement of human rights. In order to do this the Prosecutor would need to clarify the reason for allowing impunity to continue, to address accusations of political influence or institutional bias. Perhaps this could be done by redefining the 'interests of justice' in such a way that the extension of ICL into many volatile

contexts would be recognised as inappropriate and dangerous. In practice this may indeed be taking place. The Court has not intervened in Israel, Ukraine, Syria or Iraq despite the major crimes that have taken place. These may well be examples of Prosecutorial restraint, because the consequences of intervention in these situations for the major powers (and thus the Court) could be considerable. However, such a retreat by the ICC Prosecutor from the application of its Statute, postponing or setting aside its mission to end impunity and the primacy of its justice principles, remains unacknowledged. We are left with a Court that accommodates itself to political and military power not only at a situational, but also at a global level. This issue merits further research (see 8.2.3h).

Thus far by contrast in Africa, the Court's poor analysis of context has been observed, and the view that it is not mandated to make decisions on the basis of their likely consequence is brought to the fore. Yet further dangers relate to the ICC's lack of transparency. Interventions on that continent continue, where consequences on the ground—potentially profound for local communities but marginal for the major powers—are often hidden. As in the Uganda case, populations not represented by their own governments and remote from the international spotlight, with relatively weak civil society mechanisms with which to put their case, will continue to have no way to defend themselves against the violence of perpetrators and enforcers. There is a significant danger that it will be in these contexts that civilians will continue to have to pay the price for the Court's era of enforcement. This is demonstrated by the Court's record on evaluation of its work.

7.5.2 Stifling independent evaluation

Given the radical nature of the ICC project in so many respects, it might have been prudent to establish a firm basis for the evaluation of its impacts. Given the Court's arm's-length relationship to consequential and contextual evaluation before and after intervention, and the extreme violence sometimes associated

with its operations and their contexts, independent scrutiny and public access to its documentation should perhaps have been prioritised at the outset. Unfortunately this has not been the case.

The ICC Review Conference, which was required by Statute to provide an opportunity for assessment of the Court, was not stipulated in the Statute to be independent. In the event it was not. NGO representation for example was managed by the 'Coalition for the ICC', a body dedicated to the effective performance of the Court that describes itself as the 'Movement to end impunity' (Coalition for the ICC 2016). At the conference itself NGO participants were called to the hall to stand and swear their commitment to the Court's principles, as a condition of inclusion in the deliberations, even as observers (author's observation). The pivotal plenary conference session evaluating the relationship between peace and justice, was moderated by Kenneth Roth, one of the most outspoken advocates for the Court with much of his own reputation at stake. He used his position to energetically stifle the debate, indicating at the outset and again at its conclusion, that warrants had promoted peace while amnesties had not (Roth 2010). He also characterised those who criticise the Court as enemies of justice[53]. The Review Conference papers are made public on the ICC web site itself, giving the institution under review control of the findings, their recording and dissemination (ICC 2010c).

Equally, the ICC has not made its own papers available to this researcher when requested. ICC analyses of the situation relating to the LRA and the Uganda situation prior to its warrants have been removed from its web site, and requests for these have not been responded to between 2009 and 2015. Such measures stifle independent analysis concerning the Court's impacts. Without public and academic scrutiny there is a danger that lessons may not be learned; that institutional interests may remain defended at the risk of further failings of the Court; and that communities may continue to be put at risk of violent enforcement. This study has revealed a lack of attention in the Statute to the

[53] These were the author's observations on attending the Review Conference in Kampala in 2010.

need for transparency of the Court's processes, and independence of its Review. In practice significant funds were expended in bringing international delegates from the Court's global constituency to a luxury venue in Kampala, but this expenditure failed to deliver an evidence-based independent review even of its first case.

7.5.3 Remaining legitimacy

Legitimacy for the Court's intervention in the LRA situation could originally be conceived as drawn from three levels. Internationally the ICC can claim the authority conferred by its Statute, and the ratification of States Parties. In the case of the LRA warrants, there was the additional mandate at a national level awarded by the referral by the Ugandan Government, while locally the Prosecutor saw himself as responding to calls from the ground for international humanitarian engagement (3.1.6, 3.3.1 and Buchanan and Keohane 2006).

It was apparent to some on the ground at the outset that two of these three bases for action were unsound. Locally, in relation to the communities involved, the Court is not conceived nor mandated as a humanitarian agency, as the military furtherance of its international criminal justice process in this context has borne out. The case has demonstrated that military enforcement processes detached from consequential considerations may have highly negative humanitarian impacts. As Akhavan has explained, the remit of the Court concerns the furtherance of ICL at a far higher level than that of local communities affected by war. Local communities should thus beware of finding themselves caught up in its processes: consideration by the Court of their most fundamental interests is subordinate to global justice concerns (6.2.4).

Equally, it is not clear what legitimacy the Court still claims at a national level for its intervention against the LRA. The means of furtherance of the UPDF's war, principally against the LRA abductees, and the enforced displacement of the population, should from the outset have raised profound barriers to the Court's

involvement with the Ugandan military. With respect to DRC and CAR, return is now seen as pivotal to ending the violence, although as it is not driven as it was in Uganda by wide-ranging local peace efforts this process is slow. Statistics suggest that the capture of LRA members remains relatively uncommon, relative to the escape or death of abductees (LRA Crisis Tracker 2015). The Court has not made any statements concerning Ugandan military violence perpetrated upon communities, some aspects of which extended into the period of international criminal justice enforcement. It is hard to see how legitimacy conferred at the national level remains—except in relation to the Court's narrow justice frame.

Similar questions arise in relation to other ICC warrants. When intervening in Sudan, without a developed theory of change or strong understanding of the possible consequences of its warrants, the Court's legitimacy rests primarily upon its Statute. In Kenya, its failure to give adequate prior consideration to the consequences of its warrants left its local legitimacy significantly damaged. In Libya, having been associated with the toppling of one ruthless dictator, the Court is implicated in the subsequent disintegration of the Libyan state.

What has remained is the legitimacy conferred upon the Court through its Statute. Yet the analysis above indicates that both the Statute and mode of the Court's operations are flawed. In volatile contexts the primacy of the Court, resting upon its Statute and regulations, constrains other interventions and leads to situations where even ICL itself is not advanced. Based upon its Statute and its interpretation, the Court's limited notions of justice which are furthered through violent enforcement in wars and unstable situations, can be associated with devastating humanitarian impacts. In volatile contexts, the Court's theory of change which asserts a relationship between its interventions for arrest and trials on the one hand, and the advancement of human rights, good governance, and the rule of law on the other, is frequently contradicted. Concepts fundamental to the Court's structure and function are flawed.

7.6 Review

This chapter has taken the assumptions that underpin the operation of the Court that were articulated at the end of Section 1, and revealed that their validity is questionable in volatile contexts well beyond that of the case study. Suppositions upon which the Court's activities rest were identified to concern the ICC's primacy in bringing a binding new paradigm for international interventions; the narrow criminal justice frame, relative to the much broader justice considerations of communities affected by atrocities; the violence associated with ICL enforcement in volatile contexts, which may severely affect communities; and the theory of change applied by the Court, which may be relatively under-developed given its aspiration to be universally applicable.

The finding that these foundational assumptions are unsound in volatile environments is significant. In order for the Court to operate in the manner envisaged when the Statute was drafted, it may need to restrict its interventions (or have its interventions restricted) to environments in which suppositions upon which its engagement is based are valid. Failure to do so is likely to lead again to grave human rights consequences for affected populations. Additionally, other means by which unintended consequences are limited and controlled may be required. These measure will need to address themselves to all four concerns—the Court's primacy, its narrow justice frame, the violence associated with its interventions, and the weakness of its theory of change in volatile contexts.

An analysis of the considerable reforms necessary to address these fundamental issues is beyond the scope of this research. Given the weakness and lack of independence of the ICC review process, significant strengthening of the independent research effort on these issues would also be required. The final chapter offers some concluding remarks and options for future analysis.

Chapter 8—Conclusions and research implications

8.1 Conclusions

8.1.1 Ideology and liberal interventionism

The new mode of intervention associated with the Court, which is now being projected into volatile environments, has a global community of committed followers. Yet evidence calls into question the assumption that ICC interventions will be reliably correlated with reductions in violence or the advancement of the rule of law (de Waal and Stanton 2009; Flint and de Waal 2009; Armstrong 2010: 280-281; Allen 2013; Bowcott 2014; Höhn 2014; Murithi 2015; Holligan 2016). Faced with this challenge the Court has not been hungry for independent analysis, the better to understand and refine its processes for more beneficial impact. Instead, as the Review Conference demonstrated in relation to issues of peace and justice, independent evidence-based discussion has been suppressed (7.2.7). In place of a balanced discussion that weighs evidence, a narrative has been developed by the Court and its supporters articulating positions grounded in conviction and belief: there should be 'no peace without justice'; there must be 'an end to impunity'; and 'justice delayed is justice denied'. Some who question the Court have even been cast as siding with those who commit atrocities.[54] Evidence of the consequences of its interventions has not been sought or used, and has had little effect upon the ICC's constituency of support.

[54] I observed these slogans prominently promoted in support of the Court at the Review Conference. I also witnessed a distinguished figure from the Ugandan Amnesty Commission being caricatured as standing 'for impunity'; and one academic whose scholarly work highlighted the perspectives of communities and their right to be heard in discussions concerning their future, was accused of being a supporter of the genocidaires.

A reason for this is that the case for the Court rests not upon carefully collected analysis of evidence for its universal applicability, but instead upon a 'system of ideas and ideals, especially one which forms the basis of a […] political theory and policy'—that is, an ideology (*OxfordDictionaries.com* 2016). As we have seen, in the case of the Court the ideological conviction is so strong that even when peace deals are precluded in favour of ongoing war, and violent conflict thereby assured, in this instance for a decade culminating in the arrest of one individual, it is hailed as a success. The ideology has been sustained.

The ICC is not the only instance of ideologically based international intervention. It is part of the larger liberal project, which seeks to further structures and practices developed and appropriate elsewhere into new contexts, with relatively little adaptation to context through local political process. By applying universal measures, desired outcomes are expected to arise. It may be seen as the revival of a belief in simple top-down solutions imposed on complex and diverse contexts, supplanting the slow and often troubled process of political change (Young 1995; Paris 1997; Duffield 2001; Paris 2010).

In this instance a coherent theory of change is thought unnecessary—justice is anticipated to be advanced in the first instance by the simple imposition of ICL through military power. It would in any case be impossibly difficult to derive a coherent theory of change that could apply in all circumstances—the examples indicated in Chapter 7 indicate as much. Situations are too diverse to be successfully addressed through one universal process. Yet a different theory of change for each context would challenge the ICC's universalist approach (and aversion to consequentialism). Therefore, it intervenes without a coherent theory of change, using prosecutorial discretion alone—a weak and inappropriate restraint (see 7.5.1).

This research indicates that one misconception common to many who support the ICC project is the belief that the Court's actions and interventions amount to

justice. International criminal law is frequently equated to justice in the articulation of false dichotomies or imprecise maxims, such as 'peace vs. justice', 'justice delayed is justice denied', or notions that through the law 'justice will be done'. If the ICC were to be bringing justice itself, there would perhaps be less need to develop a theory of change for its application, or to understand its consequences; justice would be served simply by the Court's activities. But as this research has demonstrated, the ICC's process and approach is not justice. The Court is simply a tool through which in certain circumstances justice may be advanced. Once that is understood, the legitimacy of the Court's primacy falls away, and analysis and evidence are required to consider when and how justice may be advanced through the use of this mechanism, and when on the other hand it may not.

8.1.2 Gradualism

When an approach is driven by ideology, the need for incremental change based upon research and evidence is apparently reduced. With such a daring new mode of engagement, departing from contextual complications and consequentialist concerns, one might expect and perhaps hope for some degree of caution. Armed interventions based so heavily on principle rather than consideration of consequences represent a further paradigm shift for international engagement in volatile contexts (ICC 2010b: 5). However, although the Court's approach is determined by its legal process and driven by its mandate to address the gravest crimes, it could nevertheless have moved tentatively and incrementally: inviting independent scrutiny the better to understand its role and develop some sophistication in relation to decisions to intervene; working in situations most like those where similar courts have worked before; engaging initially in regions which are relatively stable and more amenable to civil governance processes to effect arrest; avoiding situations where consequences for witnesses or communities of ill-judged actions might be most grave.

Instead, the Prosecutor elected to do the opposite. As the case study exemplifies, subject only to political and military considerations of the Court, he deployed this new institution in the first instance to one of the gravest emergencies of the time. The greater the crimes being committed, the more outrageous the atrocities, and the more unspeakable the lengths protagonists were prepared to go to advance their ends or defend themselves, the more appropriate the Court apparently perceived its intervention, based upon the principled clarity of the law. Propelled by the urgency to address criminal acts, and without regard to the moral and practical issues of peace and security incumbent upon others, it was and is driven to engage in situations of extreme violence where the risk of adverse consequences are greatest (6.2.4).

The Statute facilitates the projection of the power of this new institution into the most dangerous of situations where risks to populations are greatest, but it does not require that its earliest cases should be those presenting the greatest dangers. The setting aside of gradualism by engaging initially in the contexts of greatest humanitarian peril, most dissimilar to the contexts of previous legal enforcement, was a prosecutorial decision. It is another respect in which the Court's launch has been both utterly ground-breaking, and ill considered.

8.1.3 Issues of justice application and concept

Chapter 1 introduced the discussion on concepts of justice, their application including through the law, and their implementation. The Court's relationship to issues of implementation has been addressed in Chapter 7. This has involved consideration of its approach to issues of power and military enforcement, the promotion of human rights, and the complex field of transitional justice and how societies move from violence to good governance. As we have seen, the Court has struggled to advance these agendas in volatile environments. It is now necessary to briefly revisit key concepts outlined at the

start of Chapter 1, in relation to the legal application of justice, and underlying conceptions of justice.

8.1.3a Legal positivism and idealism in volatile contexts

Returning to concepts of legal positivism and idealism, the research conclusions can be understood in theoretical terms. Such ideas concern choices about the basis of legal systems—whether they rest upon legal precedent and regulation in order to uphold legal consistency, or whether the legal frame should flex to accommodate circumstance in order to better reflect wider understandings of justice (Hart 1958; Dworkin 1986; Alexy 2002). The extreme environments that are the focus of this study put these legal debates under great strain. Positivist notions of justice, as applied in the LRA case, have not only failed to advance ICL and justice in their own terms; they have also been associated with human rights abuses and the sustenance of an environment in which crimes continue to be committed. These issues are not confined to the case study. Overly positivist interventions such as the Gaddafi case in Libya, and the warrants issued in Kenya, have also largely failed to advance legal justice or prevent crimes. Legal idealism on the other hand is also pushed to its limits. The requirement to avoid these terrible outcomes, which were in Uganda at least predicted, amount to permitting impunity and the abandonment of legal norms. Evidence indicates that in these most dangerous of contexts, debates about the foundations of legal form hold such great consequence that neither positivist or idealist approaches advance criminal justice, and there is little scope for compromise between them.

The application of the Court's legal process in volatile environments, whether in positivist or idealist mode, may fail to advance international criminal law, and can hinder the furtherance of broader justice notions that might be more successful. Criminal legal process may function more effectively in contexts where consequences are constrained or predictable. Such circumstances more commonly pertain within states with a functioning judiciary and civil means of arrest.

8.1.3b Retributive and restorative justice in volatile contexts

As discussed in Chapter 1, courts are conceived to help to regulate society in general, and to control the use of violence in particular. Communities are denied the right to administer retributive justice as they see fit, conceding this power to a higher authority in order to promote the impartial application of the law. An idealised view of this process would see them voluntarily surrendering their agency in this matter for the greater good, though of course more realistically the courts perform a role balanced somewhere between benign application of authority willingly given, and the enforcement of social control by the powerful (1.3). The ICC is uniquely conceived in relation to these tensioned relationships. First, its authority is only very indirectly drawn from communities where its justice will be administered, coming as it does from its Statute and the Assembly of States Parties (2.3). Secondly, committed as it is to bringing retributive processes into the volatile contexts of its interventions, the Court's use of violence for its own enforcement is new (3.2). Approaches that fail to administer retribution are seen by some as 'selling justice short' (5.3.1), and depriving communities in developing countries of the standards of justice expected in the West.

However, notions of justice are contested in Africa, just as they are in the West, and extend well beyond legal modes. While restorative justice may be achieved between equals, retribution is rarely willingly accepted by transgressors. Most commonly a body in authority administers retribution. A prerequisite for more Western retributive modes is thus the establishment (usually through overwhelming force), of an authority such as a state (Weber 1922). Retributive justice introduced into volatile contexts where no party holds such power may ignite violence to secure or evade that purpose (for example in the case of the ICC's Kenyan warrants). Introduced into volatile and contested contexts it may intensify violence in an effort either by either side to secure the right to administer retribution, or resist its application (as was the case with the LRA). In the dangerous environments of the Court's investigations, where power is violently contested, the introduction of a retributive justice approach is misguided, and unlikely to reliably advance the rule of law.

8.1.3c Deontology has consequences in volatile contexts

More fundamental than the consideration of retributive or restorative justice modes for restoring just relations are issues of the identification of just actions, introduced at the start of Chapter 1. At the heart of the issues encountered is the matter of deontology and consequentialism—a conundrum fundamental to Western moral thinking. Consequentialist approaches may lead to infringements of individual rights, even though they promote the greater good; deontological methods may result in negative consequences for the many, even while applying a just rule. If either of these elements triumphs over the other, the way is paved for great injustice (Schiff 2012).

There is no doubt that the deontological process of applying legal codes may have negative consequences. In stable democratic states with strong governance the consequences are generally contained. However, application of the legal code can even be delayed or set aside, in order to prevent overly damaging outcomes. Hostage situations provide one clear example. The deontologically aligned legal imperative to arrest hostage-takers is balanced by consequentialist consideration concerning the well-being of the hostages. Negotiations take place that mediate these opposing poles.

By contrast, unleashed into volatile and violent contexts and unfettered by consequentialist considerations, the deontology of the ICC process is unbalanced and unchecked by consequentialist concerns. These contexts are almost always highly unpredictable in nature, and the consequences of enforcement measures are unknown. When enforcement is by military third parties independent of the Court, who may or may not have regard for the law, the chances of significant violence rapidly escalates. High principle, blind to the consequences of its own application, is a powerful new frame for international engagement in war.

It has had disastrous results. The failure of the Statute to anticipate this issue, and of the international community to establish balancing consequentialist structures to safeguard populations at risk, poses a profound problem for

advocates of ICL and most particularly for communities concerned. Driven by the institutional imperative to end impunity, Prosecutors find themselves mandated to move forward on a deontological path by the Statute. They cannot acknowledge the dangers of this process without drawing attention to the worrying limitations and inflexibility of the Statute. Yet unlike the context of the application of law within states, for the ICC there is no balancing international machinery able to take into account the views of those affected, consider consequences of Court intervention, and manage associated risks.

The founding principle of the Statute, that perpetrators of international crimes must never go unpunished, is intuitively attractive and even visionary. Yet absolutist approaches are rarely helpful. Those who drafted the Statute failed to sufficiently consider appropriate limits to its power. Sometimes perhaps stability and security for the many should be prioritised over the arrest of a few individuals, however grave their crimes. Sometimes military enforcement might be anticipated to involve the killing of too many innocent people to merit the prize of arrest (indeed, some might argue that one is too many). Sometimes communities should be permitted to chart their own path out of violence, even if in doing so they choose forms of justice other than retribution. Balancing mechanisms for upholding such consequentialist concerns are absent.

When applied, the ideological notion that international criminal justice processes should bind international interventions in volatile regions can prove dangerous to civilian populations. This has been demonstrated in the circumstance of the Court's first arrest warrants. When populations are at risk, ending impunity may not be the most pressing consideration. Such situations demand that we look 'beyond retribution' (Mani 2002).

In Chapter 1 it was observed that justice is a concept held in tension between opposing poles. Each extreme is essential—an aspect of the whole without which justice cannot be fully attained. Yet in its pure form, each is fundamentally flawed, revealed as such by the balancing considerations of its opposite pole. The threads that span the divide are tensioned, and hold justice

as if upon a web. Should one thread break—one pole triumph over its opposite such that its rival's footing is lost—the tension is broken, and the structure becomes distorted.

So it is in this case. The tension between two poles has broken. In the contexts of this study, legally constituted deontological forces have triumphed over balancing considerations of consequentialism. One pole has been detached, and a thread is trailing. The web that held justice taut has lost its form. This concluding section offers a reflection on the way this has occurred.

Chapter 2 (2.2) considered the origins of the Court in the mid-19th Century, founded upon the abhorrence of human suffering in war, prompted by the impunity enjoyed by the most prominent perpetrators, and guided by the desire to bring them to trial. Seventy years or so later the Nuremberg trials signalled the possibility that this vision might become a reality. Facilitated by the allied military victory, Nazi atrocities were not overlooked in the final settlement, and their crimes were addressed through legal process (2.1.2, 7.1.4). There was cause for optimism at this development, but it also raised questions. The victors had considerable influence over the justice process, and the vision of impartial and unconstrained legal jurisdiction remained an aspiration. Although the implementation of ICL post-conflict seemed relatively straightforward, questions concerning its application to ongoing wars and volatile contexts remained largely unexplored.

By mandating the ICC to intervene even in the most violent ongoing conflicts, the architects of the Rome Statute failed to anticipate these complications. They neglected to adequately consider under what circumstances the Court might be successful in advancing ICL; when it might instead legitimise violence and a retributive ethos, and promote wars of enforcement in which civilians could be the principal casualties. In Chapter 3 questionable aspects of the Court's process were enumerated for consideration, and perhaps the most prominent of these was the anticipated application of principle, backed by

military violence where necessary, without thorough consideration of consequences.

There are voices calling for ICC reform, advocating a transformational process that would enable it to become engaged in problem solving, deploying a wide variety of justice measures in a way that is significantly more accountable to those communities who will bear their consequences (Findlay and Henham 2010). However, the Preamble to the Rome Statute leaves little room for equivocation. It states, 'unimaginable atrocities that deeply shock the conscience of humanity […] the most serious crimes of concern to the international community as a whole must not go unpunished and […] their effective prosecution must be ensured' (*Rome Statute of the International Criminal Court* 1998: Preamble). This research has demonstrated that, in certain circumstances, the pursuit of arrest of a few individuals may become entangled with the continuation of a war that costs many innocent lives. This study of the Court's first case has demonstrated how unquestioning adherence to this principle of the Statute caused it to become associated with sustained violence against civilians.

The finding that the ending of impunity should not be achieved *at any cost* should come as no surprise. Sometimes the cost will be too great. There are limits to the suffering that is acceptable in support of furthering the trial of one individual. This possibility is inadequately catered for in the Rome Statute. The tension between deontological and consequentialist considerations of justice should now be restored.

8.1.4 Concluding remark—justice accommodated to power

This study has demonstrated that deontological and retributive emphasis of the Court is ill suited to the administration of justice in volatile environments, where the consequences of its actions may be extreme. In these contexts, interventions based on legal principle rather than considerations of

consequence are a profound departure for the international community. The evidence indicates that by placing the ending of impunity above other justice or humanitarian considerations, the Court can legitimise violence of enforcement, trigger violence by perpetrators, and prevent negotiated settlements to wars.

Ultimately this thesis is about how a powerful institution with even more powerful backers subordinated the interests of a relatively powerless community. Casting them as victims, it claimed to be acting on their behalf, while stifling dissent. Its actions were legitimised by a limited notion of justice, founded upon an ideology that authorises the use of violence.

The community was seeking an alternative path out of insecurity and war that was inclusive, practical and effective. In a most hostile environment it involved developing a capacity for empathy; an appreciation of the value of all human life; and an intolerance of violence. These notions also inspired early aspirations for international criminal justice and the ICC. But a critical attitude towards violence itself, essential to the Court's original vision, was too bold a step to be enshrined in the Statute. This left an ambiguity, and from the commencement of its first intervention the ICC associated itself instead with military power, and sought to turn violence to its own ends.

8.2 Contribution, limitations and research implications

8.2.1 Contribution

Summarising the points concerning contribution brought at the outset, it is sufficient to note that this research is an original critique of the Court, founded upon its philosophically deontological mode of operation, revealing it to be highly unsuited to operation in volatile environments. This is exemplified by the case study. In the process of this research, assumptions embedded within the Statute are revealed. These are tested by the case study, and shown to be

unsupported. The ICC's Statute and mode of operations are thus demonstrated to rest upon assumptions that are unsafe.

Additional contributions to knowledge are made, through the exposition and demonstration of the LRA war as being rightly conceived as a three-sided conflict, placing the civilian population not only as a victim of both sides, but also as a third party with an independent strategy, objectives and agency in its efforts to end the war—efforts opposed by the Government, LRA and ICC. In the process of analysis of the LRA war from 2000-2010, the prevailing largely supportive account of the ICC's intervention is demonstrated to be widely disseminated, but inaccurate and fundamentally flawed in multiple respects.

The consequences of these original findings are significant in relation to the application of international criminal law to volatile environments, demonstrating as they do that its approach is not necessarily aligned with the interests of war-affected communities or the promotion of their human rights.

8.2.2 Limitations and future work

This study set out to draw conclusions from the LRA case that had relevance beyond the individual situation, for the ICC project as a whole. While this has clearly been achieved, and systemic operational and conceptual issues in relation to the Court have been demonstrated, the study is not without its limitations, and these are now acknowledged. Some of the most prominent are mentioned here.

The research is firmly grounded in the Ugandan Acholi community experience of the conflict, and this has given it particular authority in presenting a view of the LRA war in Uganda between 2000 and 2008, and has ensured that the work made a contribution to knowledge. However, strong engagement at a governmental level alongside the community-based analysis could have

provided a clearer understanding from a policy perspective, and further contributed to understanding of the Court's involvement and influence.

A more comprehensive study than that possible within the frame of a doctorate would have engaged the ICC Prosecutor, key staff, and prominent advocates for the Court on the systemic and conceptual issues raised by the work. This might have permitted a more thorough interrogation of the findings, and taken the critical analysis to a new level. It is regrettable that the Court was not forthcoming in providing its analyses of the Ugandan context prior to and soon after issuance of the warrants. A clearer appreciation of its perceptions at that time might have yielded further insights.

A third significant limitation was the use of one case study. While this was a necessary and deliberate choice, in order to expose the poverty of the existing discourse on the Court's intervention in Uganda, collaboration with other researchers equally well-versed in the ICC's engagement in Sudan or DRC for example, could have enriched the learning from a single case. The signposting to other situations and cases in Chapter 7 takes this some way, but further work remains to be carried out in this area.

A fourth significant improvement could have related to the methodology. The research was presented during its development to various academic audiences. However, a more focused and comprehensive engagement of scholars knowledgeable in the field, at regular intervals during the research process, might have further tested, developed, and strengthened the analysis. That process may at least now be promoted through publication.

A fifth limitation is undoubtedly the length of time that has elapsed since these events and the end of the Juba talks. While this work has been self-funded and part-time (at best) the research itself highlights the power of early dissemination of material if a narrative is to be established in academic and policy circles. It is regrettable that less well informed perspectives have come to dominate so

much of the discourse. The timetable for writing and disseminating findings is pertinent to establishing understanding of events and contributing to knowledge.

8.2.3 Research Implications

8.2.3a Evaluation and review of ICC interventions

A review process organised and managed by supporters of the institution under examination will not be functional as an evaluation exercise. As we have seen in relation to the case study, the 2010 Review Conference contributed to the re-articulation of a narrative that fits the requirements of the institutions involved and their associated ideology. Much of the evidence upon which this PhD research is based was present prior to the ICC's intervention, and certainly by the time of the Review in 2010, yet it did not inform the analysis that emerged (Gersony 1997; Dolan 2000b; ARLPI and JPC 2001; Dolan 2002; HURIFO 2002; ARLPI et al. 2003; Baines 2003; ARLPI 2004; Branch 2004; Branch 2005; Dolan 2005; Finnström 2006a; Finnström 2006b; Baines 2007; Branch 2007b; Branch 2008a; Finnström 2008; Branch 2009; Blattman and Annan 2010; Branch 2010b; Dolan 2011). The first warrants were even claimed as early signs of success in relation to harmonising the requirements of peace and justice (5.3.1). The lack of evidence in support of the Court was no impediment to the drawing of positive conclusions. Efforts by Afako and others to broaden the discussion to areas such as the relationship between ICL enforcement, peace and human rights—areas which this study has revealed as critically important—were decisively curtailed (Afako 2006; Afako 2008; Afako 2010; ICC 2010b; ICC 2010a).

The Review did not lead to the creation and refinement of transparent institutional checks and balances. Hard lessons for the ICC's normative process from this first case have not yet been gathered. The presentation of evidence that should have promoted an investigative dialogue, the better to understand the Court's impacts, is perceived as unhelpful. The process of institutional review itself merits investigation, and could promote a more rigorous approach in future.

8.2.3b Divergence of civil society interests from those of international criminal justice

Potential divergences of civilian interests from those of ICL are likely to be an important field of work, as it may help to clarify the choices being made when the ICC engages in a region (6.2). In the context of an intervention, one line of enquiry might be to investigate the disparity of views on ICC interventions between local and international human rights organisations. The case study has revealed that local representatives from churches and the traditional leadership, as well as local human rights organisations, all opposed the ICC's intervention (6.2), while international human rights organisations such as Amnesty International and Human Rights Watch were in favour (5.1). This divergence concerns the former's commitment to consequentialist considerations relating to community safety, and the latter's primarily ideological, deontological or institutional commitments to arrest. A clearer understanding of this divergence of position and interests in other volatile contexts could help to inform the grave nature of decisions being made in pursuit of the norms of ICL.

8.2.3c Local real-time assessment of ICC engagement

A strong evidence-based assessment of ICC interventions might involve real-time tracing of attitudes, events and experiences of communities on the ground. Local human rights organisations might be well placed to carry out such work, in collaboration with a university or research institute. Such processes would yield on-the-ground data and analysis similar to that which has made this study possible, and its dissemination during any military enforcement stage of the ICC process would have the potential to greatly enhance understanding of the impacts of the Court. Evidence gathering might be rooted in local experience of the violence, through the use not only of interviews and testimonies, but also cameras distributed to the population, and/or mobile phone apps that enable on-the-ground data gathering by text, photos or video in real time. Engagement and dissemination of information of this kind would help to correct the tendency of narratives to reflect institutional interests, and strengthen efforts to root them in community understanding and experience. It could raise the profile of civil

society perspectives and people's experience of violence, making them harder to overlook in future. The population's experience of the implications of the enforcement of the norms of international criminal law might then become better understood.

8.2.3d Projecting local strategic analysis into the academic and policy debate

A lost thread in the debate has been the articulation of community-based understanding of war and violence. There has been a perception that local knowledge belongs to ethnographic or anthropological spheres, and that these are of marginal relevance to strategic considerations and the application of international standards of criminal justice. There has even been a mis-perception that the Court can speak and act on behalf of communities affected by violence (5.1). Interest in, for example, traditional reconciliation ceremonies has been explored for its relevance to the dynamics of conflict resolution and the role of forgiveness, and challenged regarding its utility in the face of the extreme violence experienced (Pain 1997; Allen 2006b; Baines 2007; Allen 2010; Allen and Vlassenroot 2010). But the central point, that communities understood the cycle of killing and abduction, and sought to end this violence inflicted upon them by both sides through an alternative process of return and reintegration of abductees, is not one of ethnographic or anthropological importance alone. Their understanding was of enormous strategic significance to the war, and this strategic aspect was ignored, causing great harm to the affected population.

One can observe that the un-evidenced mainstream account that emerged in the literature, founded upon statements from the Prosecutor, Ugandan Government, institutional supporters of the Court and others, almost entirely eclipsed local evidence-based research and understanding. It is regrettable that the profound insights of local peacebuilders and others, so inconvenient to the ICC's cause, have been largely written out of the mainstream narrative. It is disturbing that this is also true in accounts from international institutional human rights defenders (5.4). This may be pure chance. On the other hand it may be

that the marginalisation of local discourse on the war, and local remedies to it, was necessary in order to uphold institutional commitments to defend the Court.

A significant area of future research work might involve the projection of local strategic analysis of violence and war that they have experienced into academic and policy debates, particularly in regions of ICC engagement, so that civil society approaches to conflict resolution may be less easily set aside in future. Communities have agency and expertise with significance at a strategic level. Their portrayal as helpless victims awaiting rescue by international institutions does a great disservice to them, and to prospects for conflict resolution. As this research indicates, relative to those spearheading international interventions, local insights may be of superior strategic, humanitarian, moral and practical significance.

8.2.3e Strengthening the relationship between discourse and evidence

This study has revealed verbal and documented claims made by Court officials and others that are unsubstantiated. These have been disseminated in the literature, and then referenced as if providing evidence, eventually being restated in textbooks. Some have even referenced their own previous, evidence-free assertion (6.3). This poor practice has been instrumental in generating a pro-ICC discourse in which even the LRA warrants are cited as a success (Chapter 5). If a fruitful debate is to be established it must rest upon evidence, and there are a number of ways in which the relationship of the evidence base to the discourse might be tested, and thus improved. Research that examines the points below might be fruitful.

There is a need for the Assembly of States Parties to distinguish between evidence-based assessment and advocacy positions when it receives statements and reports (5.1, 5.4, 6.5.1). Research that examines the evidence-base of statements to the ASP by or about the Court may be a useful starting point in drawing their attention to this issue, and suggesting safeguards.

There has been an apparent willingness to believe statements made by those with a clear interest in the promotion of the Court. The Prosecutor's view, for example, has been accepted and disseminated uncritically as evidence of the Court's good work even when asserted without evidence. Such uncritical repetition of self-interested claims, including in peer-reviewed journals, is poor practice. Further research to distinguish substantiated and unsubstantiated aspects of the discourse could be instrumental in promoting evidence-based debate. This process might also help to determine whether the instances of assertion without evidence highlighted in this research are isolated, or part of a broader institutional or individual pattern of behaviour.

8.2.3f Monitoring of violent ICL enforcement

There will undoubtedly be contexts where violence may be a result of ICC intervention, either by those named in arrest warrants and their supporters, or by military forces engaged in enforcement. In our case study the use of the UPDF, with its violent strategy directed against the civilian population, has highlighted that there are troubling complications of military enforcement of ICL. An independent survey of the military strategies, practices and conduct of armies enforcing ICC warrants would bring a spotlight to bear on this unregulated and poorly understood aspect of the furtherance of ICL. It might also serve as a foundation upon which to develop and promote better practice in relation to the co-option of violent enforcers, the use of violent enforcement methods, and the issuance of warrants into contexts in which violence is likely to be legitimised in the service of ICL. While this would not address the most fundamental issues, it could help to mitigate some of the most violent impacts in the short-term.

8.2.3g Monitoring the impact on peace talks

As we have seen, there is a need for evidence-based debate on the issue of the ICC's impact on peace processes. In this case, where it is apparent that the ICC twice precluded the positive resolution of peace talks, the baseless assertion that its impact on talks was positive was widely disseminated, and that

notion achieved sufficient support that learning has so far been prevented. Generating an inquiry into this issue rooted in evidence and free from institutional influence remains an important goal for research in this field.

8.2.3h Identifying Court constraints

In addition to work in regions affected by ICC engagement, research is needed in volatile regions where perpetrators of international crimes are present and the Court has chosen not to intervene. During its first decade the Court has focused on conflict regions in Africa, and this has brought criticism from various quarters. Yet we have seen that in relation to wars and volatile regions there may be good reasons for the Court not to intervene. In relation to conflict-affected areas the problem may not be too little intervention outside Africa, but too much within. If nothing else, this research has indicated that in volatile regions the combination of retributive ethos and military engagement, and principled intervention unfettered by consequential analysis should cause significant concern.

If this were the case, then research that uncovers what has restrained ICC action outside Africa would be highly pertinent. It may be that consequentialist considerations either for communities and states with a voice, or for the Court itself, have played a part in staying its hand in relation to other conflicts. Stable, democratic or powerful states may experience international crimes less often, and be better equipped to deflect the interest of the Court if they do. Those in weak states with poor governance, poor communications, and weak civil society institutions are more vulnerable to having their views, expectations and experiences ignored. One could postulate that there is simply more space for the Court to operate in Africa. Research that contributes to a strong analysis of what has stayed the hand of the Court might help contribute to efforts to sustain, develop, and most of all promote broad understanding of those issues. It might enable communities to defend themselves. If consequentialist concerns are revealed, a stronger framework for civilian safety might emerge. If they are not, then the absence of any such framework would be worthy of widespread debate.

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Appendix 1 Timeline of the LRA conflict 1985-2010

This appendix is provided to assist with clarifying the sequence of events referred to in the text, with indicative referencing. It is not intended as a stand-alone timeline of all main events relating to the LRA conflict. Key sources for these listed events, particularly in the early years, are Allen and Vlassenroot (2010) and the International Crisis Group (2004), and these are not referenced individually by each item. All other sources are referenced by their individual entry. Another chronology for general use covering the same period is provided in Drew (2010).

1985	July	An Acholi-led coup ousted Obote in July '85.
1986	January	The NRA toppled Okello government in January. The UPDA emerged in 1986.
	March	The NRA arrived in Acholiland, and the last remnants of the UNLA had disappeared from Acholiland by the end of March.
	April	Stories started to emerge about NRA abuses.
	May	Fighting in the North took place. Gulu and Kitgum were declared war zones.
	August	20th Alice Lakwena began her direct involvement in the war. The First UPDA incursions from Sudan took place. 30 people were killed in Bibia by the NRA.
	October	Mid-late-'86 NRA-associated forces massacred over 40 people in Nam-Okora. Holy Spirit Mobile Forces (HSMF) attacked Gulu and were defeated by the NRA.
	November	The UPDA came together around this time. Karamojong cattle raiding took place from the east, supported by the NRA as far west as Gulu. Lakwena backed by 150 troops from the UPDA successfully attacked the NRA at Corner Kilak. Her HSMF force grew rapidly.

1987	January	The Karamojong stole almost the entire Acholi cattle herd, their accumulated wealth, in successive raids during 1987 (Rodriguez Soto 2009: 162).
	February	Kony joined the UPDA as spiritual mobiliser, and with some followers seized UPDA division command.
	March	The UPDA began to fall apart, having failed to protect civilians from the NRA. The first 'protected camps' were created in Gulu by the Government of Uganda (GoU).
	June	The GoU declared an amnesty for rebels prepared to surrender.
	July	At Corner Kilak the NRA executed 97 people. Operation Coy, which ran until September, began to flush out the UPDA.
	November	The HSMF were defeated near Jinja. Kony attacked the UPDA base near Pawel Owor.
1988	January	Most UPDA surrendered during the year, though some joined Severino Lokoya, Alice's father, who attempted to sustain it. Kony attacked the 115th Brigade of UPDA and integrated elements of it into his force.
	February	Bigombe was appointed this year as Minister of State for pacification of the North.
	March	A UPDA/NRA ceasefire was called.
	June	Odong Latek, overall commander of UPDA, joined Kony with 39 fighters. The Pece Peace Agreement with the GoU dissolved the remaining UPDA force. Major NRA operations against other rebels began, and 40 civilians were massacred at Koc Goma. Museveni extended amnesty to all armed groups.
	October	The GoU continued to force civilian displacement.

1989	January	Severino Lokoya was captured during 1989.
	February	Museveni declared a 3 month moratorium on military operations near Gulu. After some failures the NRA intensified assaults and moved people back into camps.
	July	Fighting intensified from this period for three years. NRA abuses continued. The GoU continued moving people to camps.
	December	Kony's force was named the 'LRA' by the end of '89. Bashir came to power in Sudan through a bloodless coup in 1989.
1990	January	The LRA became the only significant force fighting the GoU in Acholiland.
	April	The NRA launched 'Operation North' led by Daniel Tinyefuza.
1991	July	The LRA committed major revenge killings and atrocities against civilians.
	August	Operation North was wound down by the Government. During 1991 John Garang was seen in Gulu, a sign of US engagement in the conflict and its internationalisation as a proxy war involving the SPLA and Sudan.
1993	January	1993 Bigombe initiated her first direct talks with the LRA (Worden 2008).
	February	93-'94 The LRA moved bases Eastern Equatoria in southern Sudan at the invitation of the Government of Sudan (GoS). The GoS started to support the LRA.
	May	Over the mid-90s the LRA extended abduction with backing from Sudan, and became able to launch large attacks in Uganda and Sudan.

1994	January	Sudanese support for the LRA was in place by 1994.
	February	The first Bigombe peace talks took place between LRA and GoU. These collapsed after Museveni delivered a 7-day ultimatum, while some observed that the LRA were already regrouping.
	March	Mass abduction after 1994 became essential to sustain LRA numbers.
1995	January	LRA violence and abductions intensified over the following two years. The LRA target of 1,200 abductions in Kitgum District for the year was exceeded.
	April	On around 21st April the LRA committed the Atiak massacre, killing over 200 people (Gersony 1997). During the year diplomatic relations between Uganda and Sudan were cut off.
1996		During 1996 the GoU removed a significant proportion of the population to IDP camps. The UPDF violently implemented this decision, resulting in widespread destitution (APRIL and JPC, 2001).
	February	An LRA offensive took place in Gulu.
	March	8th The LRA committed the Karuma/Pakwach convoy ambush, killing 50 and injuring 30 bus passengers (Gersony 1997).
	June	Bigombe was dropped from Museveni's cabinet.
	July	The LRA committed the Acholpi refugee camp massacre, killing almost 100 people and seriously injuring many others (Gersony 1997).
	October	The LRA raided St Mary's College Oboke and abducted 139 girls (Rodriguez Soto 2009).

	December	In presidential and parliamentary elections Museveni won little support from the Acholi. A *Kacoke Madit* peace meeting took place in London (Lucima 2002)
1997		Mass abductions too place during this period. From 1997-99 between 6,000 and 10,000 people were abducted (HRW Africa 1997).
	January	During ’97 and ’98 diaspora-led attempts for settlement failed. Raska Lukwiya led the massacre in Lamwo County at Lokung/Palabek in which over 400 civilians were killed—the largest massacre at the time (Rodriguez 2004a). From 97-99 there were many LRA atrocities against civilians, and parliament also escalated the war. St Egidio hosted a peace meeting between LRA and GoU.
	February	Estimates of LRA numbers vary, but reach 3-4,000.
1998	March	March-June ARLPI presented a memorandum for peace to Museveni and held a three-day consultative meeting to focus on ending the war.
	September	The Amnesty Act was published in the Uganda Govt. gazette, supported by civil society in the North and the international community.
1999		During 1999 efforts to restore diplomatic relations between Sudan and Uganda began.
	January	From 1999-2000 the LRA were mainly in Sudan, and Uganda was quieter. The Carter Centre process between Uganda and Sudan got underway in 1999, following an invitation from Bashir for their involvement.
	November	By end of 90s a significant proportion of the rural population, particularly West of the Aswa, were held in IDP camps, perceived as prisons.

	December	The Nairobi Peace Agreement between Uganda and Sudan was signed on 8th December.
2000	January	The Ugandan Amnesty Law was passed following local and international pressure, despite Museveni's opposition. An international agreement between Uganda and Sudan resolved that they should cease reciprocal support for each other's rebel movements.
2001		In Kitgum District up to 2001 LRA atrocities caused additional displacement to IDP camps, the total in the war-affected area rising to 500,000. Many children died (ARLPI and JPC 2001)
	January	The Carter Centre process led to strengthened Uganda/Sudan diplomatic ties again during 2001.
	March	Commanders started to return from the LRA—Onekomon came back to Pajule with 12 others (Rodriguez Soto 2009: 8-18).
	June	A quieter period allowed contact with LRA commanders for return. Local peace talks in Gulu by District Reconciliation and Peace Team ended in failure.
	August	Uganda and Sudan resumed diplomatic relations previously cut in 1995 (Lucima 2002: 57).
	September	11th The US declared the LRA a terrorist group, bringing Sudan under further diplomatic pressure (ibid).
2002	January	LRA attacks on civilians were renewed. Attacks intensified and more civilians were displaced to IDP camps, this time by the LRA.
	March-April	Military protocols between Uganda and Sudan allowed Operation Iron Fist to begin (UNOCHA 2003: 1). Hundreds of LRA (including abductees) were killed. The LRA

		increased activities in Uganda. The intensification of the war caused hundreds of thousands to be displaced. By mid-2002 only 1.6% of returnees had received amnesty packages (APRIL et. al. 2003).
	June	Purongo camp was attacked by the LRA, and then shelled by the UPDF (formerly the NRA) (Finnström 2008: 156-7). Between June 2002 and March 2003 5,000 were abducted by the LRA (HRW 2003a).
	July	The ICC began to function on 1st July.
	August	Museveni's offer of a ceasefire for talks was rejected.
	September	A further GoU ultimatum to the civilian population ordered more people to move to the IDP camps, contributing to raising the camp population to 800,000 by the end of the year (Rodriguez Soto 2009).
	October	There were renewed allegations of support for LRA by GoS. 12th The LRA massacred 100 at Amyel, and on 22-24th 17 died in ambushes in Atanga (Rodriguez Soto 2009: 118).
2003	January	On 7th the UPDF killed 19 using a helicopter gunship. They were being abducted; most of them were children (ibid). During 2003 the LRA began using landmines, and extended its operations to Soroti, Katakwi, Lira, Teso and West Nile. Various LRA commanders were killed (UNOCHA 2003).
	February	The GoU used civilians to form Arrow and Amuka Groups to fight the LRA in Teso and Lango during 2003.
	March	Kony announced a unilateral ceasefire. Peace contacts were made from 1st March, but were bombed by the UPDF (Rodriguez Soto 2009: 132-143).
	April	LRA atrocities continued. Some reported 5,000 abducted by the LRA in 12 months (HRW 2003a).

	June	In a worsening humanitarian situation estimates reached 12,000 abducted by the LRA in the previous year (Rodriguez Soto 2009: 168).
	September	Protocols further enabled the UPDF to operate in southern Sudan (UNOCHA Uganda CAP 2004:1) The LRA intensified the war in Uganda's Teso and Lango regions .
	November	Sam Kolo and Bigombe engaged in talks (Rodriguez Soto 2009: 202).
	December	16th Uganda referred the LRA leadership to ICC (Akhavan 2005). By 2003 there was more frequent contacts between the religious leaders and LRA commanders, preparing the way for defections (Rodriguez Soto 2009). 1.2 million of the population had been displaced to IDP camps (UNOCHA 2003).
2004		3,000 LRA abductions were recorded in 2004 (UNOCHA 2004).
	January	The LRA size was estimated to be 3,000. Jan-June was a period of poor security (UNOCHA 2004). 29th Museveni and Ocampo held a joint press briefing in London to announce that the ICC was looking into the LRA case (Allen 2005: 42).
	February	2nd The LRA attacked Pabbo camp, followed by UPDF brutality to civilians there. The LRA attacked Abiya camp near Lira killing 44. 21st The LRA committed the Barlonyo Massacre, where nearly 300 were murdered (Rodriguez Soto 2009: 207).
	March	Uganda and Sudan renewed their protocol and Operation Iron Fist II was launched into southern Sudan. Middle-ranking LRA commanders were returning to claim amnesty. Bigombe became more involved in talks again,

	and community concerns about ICC engagement were expressed to Ocampo (UNOCHA 2004; Rodriguez Soto 2009: 220-221).
April	There was speculation that the LRA were weakened due to the return process, and UPDF action between April and October (ibid).
May	The LRA committed the Pagak atrocity.
June	By mid-2004 around 5,000 adults had passed through the return system and been given amnesty certificates. Bigombe travelled to southern Sudan for her peace process (ICG 2005c: 3). The Prosecutor announced that there was a case to answer in Uganda .
July	28th The Prosecutor opened the ICC investigation, having determined that there was a case to answer (Ocampo 2005b).
August	Due to insecurity night commuter numbers rose to 50,000 (UNOCHA 2005a). The return process gained momentum. In the period from April to August/September 400-500 LRA returned including 50 officers (HRW 2009b: 32; Rodriguez Soto 2009: 233).
September	Radio stations such as Mega, and the UPDF, were increasingly supportive of the return and Amnesty process (ibid).
October	There was increasing hope for peace due to the weakened state of the LRA (caused by return, UPDF activity, and reduced Sudanese support), and Bigombe's peace efforts. About 3,000 people had been abducted by them in the previous year (UNOCHA 2004).
November	From mid-November to the year-end there were further peace contacts with the LRA. The Patiko ceasefire took place up to 31st December (Rodriguez Soto 2009: 237).

	December	Bigombe secured face-to-face talks between the GoU and LRA, however these failed by 31st (ibid). Population displacement by the year end had risen to over 1.6 million (UNOCHA 2005a). 4-5,000 LRA had applied for amnesty on return (Allen 2006).
2005	January	Fighting resumed, as did Bigombe's peace contacts (Drew 2010: 25). 9th The Sudanese CPA was signed, transforming the context of the war (Flint and de Waal 2008).
	February	Bigombe threatened to end her talks if the ICC issued warrants (ICG 2005c: 5) Museveni called a truce for over two weeks (Rodriguez Soto 2009: 245). Prominent LRA commanders Onen Kamdulu and Sam Kolo returned in separate incidents, though night commuter numbers remained high at 30,000 (UNOCHA 2005a).
	March	Bigombe's efforts for further contacts were obstructed by the UPDF (Rodriguez Soto 2009: 246). Amidst a deteriorating security in Uganda the LRA returned to committing body mutilations (UNOCHA 2005a: 2,13).
	April	There were thought to be 41,000 night commuters by this time (ibid). There were thought to be approximately 3,000 LRA remaining (ICG 2005c).
	May	The LRA massacred 20 at Koc Goma (Rodriguez Soto 2009: 267). 6th The Prosecutor applied to the Pre-trial Chamber for arrest warrants against un-named individuals (Ocampo 2005b).
	July	8th Warrants for the LRA leadership were issued under seal (ibid). The WHO issued its report on deaths in the camps, which implicated both armed sides (Ministry of Health of Uganda and World Health Organisation 2005).
	September	LRA established Garamba bases in DRC (Drew 2010).

	October	13th The Prosecutor unsealed the warrants (ibid). Bigombe announced her talks had collapsed (New Vision 2005).
	November	CR/QPSW presented to the Donor Technical Group speculating that the LRA had been reduced by 75% since 2002 (author's notes).
	December	The Government of South Sudan (GOSS) indicated its interest in acting as mediator (Drew 2010). The International Court of Justice ruled against Uganda in the Uganda/Congo case, confirming that the UPDF carried out torture, killings, recruitment of child soldiers and other crimes against civilians (ICJ 2005b). By December 2005 over 10,000 had received amnesty in the Acholi region (Rodriguez Soto 2009).
2006	January	A United Nations Mission in the Democratic Republic of Congo (MONUC) operation against the LRA in Garamba failed (Drew 2010). Bigombe left Uganda (Rodriguez Soto 2009: 246).
	February	The LRA relocated more fully to Garamba during 2006 (ICG 2010: 28).
	April	Otti and Machar met for the first time, in preparation for the Juba process (Drew 2010).
	May	Machar and Kony met (ibid).
	June	8th The Juba process began, with Machar mediating. Kony appointed a delegation to represent the LRA (ibid).
	July	14th Talks began in Juba. Raska Lukwiya was killed by the UPDF near Kitgum (Rodriguez Soto 2009: 261).
	August	26th A Cessation of Hostilities agreement was signed that came into force on 29th, and was later extended numerous times (Drew 2010).
	October	A Cessation of Hostilities monitoring was team established. Attacks in northern Uganda diminished (ibid).

	November	The LRA failed to assemble in the appointed areas.
	December	A comprehensive solutions protocol was signed. It was believed that Sudan was continuing to support Kony at this time (Rodriguez Soto 2009: 262).
2007	January	The talks made very slow progress in the first quarter of 2007 (Drew 2010).
	April	26th The talks re-started (ibid).
	May	2nd The ICC issued two Sudanese arrest warrants. Agreement was reached between the Gou and LRA on comprehensive solutions to the problems of northern Uganda. 31st Talks on accountability and reconciliation resumed (ibid).
	June	24-25th The Prosecutor emphasised that any settlement must be compatible with the ICC's Statute (by bringing suspects to trial), as he had done throughout the Juba talks process (Ocampo 2007a). 29th The GoU and LRA agreed to general principles on accountability and reconciliation (ibid).
	September	Museveni and Kabila set a 90 day deadline for departure of the LRA from DRC (ibid).
	October	Otti was arrested and killed by Kony, while LRA commander Opiyo Makasi surrendered (ibid).
	November	Contact with the LRA diminished. 29th Kony failed to sign the agreement on accountability (Rodriguez Soto 2009: 272).
2008	January	Talks resumed with a new LRA delegation (ibid).
	February	23rd A permanent ceasefire was signed. 29th DDR agreements were concluded. Agreement was reached on accountability and reconciliation ready for signing, based upon prosecution by a Special Division of the Ugandan

		High Court (Worden 2008).
	March	From March the LRA further strengthened their camps in Garamba (HRW 2009a: 15-17)
	April	10th Kony failed to sign the final agreement (ibid). LRA attacks and abductions increased (Drew 2010).
	June	Kony told journalists that he wished to return to negotiations but that the ICC should drop the warrant against him (ibid).
	July	LRA estimated to have 600 combatants (HRW 2009a: 13)
	September	Kony failed to attend a scheduled meeting citing the ICC warrants (Drew 2010). Kony moved his HQ to Kiswahili camp in Garamba (HRW 2009a: 17-26). The LRA turned on Congolese civilians in Duru and elsewhere, abducting 161 and killing 100 (ibid).
	October	LRA atrocities continued including killings and abductions in Dungu (ibid).
	November	Machar demanded Kony sign the Final Peace Agreement by 30th Nov. 28th Kony failed to attend the planned meeting, and talks effectively ended (ibid).
	December	14th The Ugandan, Sudanese and Congolese militaries launched Operation Lightning Thunder, which failed to have a significant impact on LRA (ibid). 24th The LRA responded by committing the Christmas Massacres in Doruma, Faradje, Tora and Duru (ibid).
2009	January	Continuing LRA attacks to mid-January left 620 killed—the largest ever LRA massacre (ibid).
	March	15th Operation Lightning Thunder officially ended, though the UPDF continued operations against the LRA (ICG 2010: 28). 4th The ICC issued a warrant for Bashir.

	December	There were reports of air drops by Sudan for Kony.
2010	February	LRA activity was widespread in south-west Sudan, including abductions and training, raising the possibility that Kony was still being assisted by Khartoum.
	November	The UPDF withdrew troops from CAR due to elections in Uganda, leaving only 1,200 in CAR and 1,200 in DRC/Sudan (Cakaj 2011).
	December	Kony present in CAR (ibid).